AN

INTRODUCTION

TO THE

LAW

RELATIVE TO

Trials at Nisi Prius.

THE SIXTH EDITION, CORRECTED;
WITH ADDITIONS TO THE PRESENT TIME.

By FRANCIS BULLER, Esq.
Of the MIDDLE TEMPLE.

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ADVERTISEMENT.

SOME considerable additions which have been made to the present edition of this book would necessarily vary the pages, so much as to render the Index very incorrect, if some care were not taken to prevent it. Therefore when new matter has been added which will fill a page; it is printed under the same number as the former page, but between crotchets, and the old pages are preserved as much as possible.

This it is hoped will prevent many variances between the book and the index.

The work might have been easily swoln to a much larger size, by adding other determinations on the same subjects; but the original design of it was to collect rules and points, and not to report cases. It was intended for a *vade mecum* on the circuits, and prolixity would have destroyed its use.

AN

INTRODUCTION

TO THE

LAW, &c.

PART I.

Containing THREE BOOKS

Of Actions founded upon Torts.

INTRODUCTION

TO

PART THE FIRST.

IT was for their mutual conveniency and defence that men first entered into society, thereby submitting themselves to be governed by certain laws, that they might in return enjoy the benefit and protection of them. *Legum denique idcirco omnes servi sumus, ut liberi esse possimus.* Cicero pro Cluentio.

Hence

Hence the end of the law is to preferve men's perfons and properties from the violence and injuftice of others; and for that purpofe it does, in all inftances of an injury being committed, either inflict a punifhment upon the party offending, or give a recompence to the party injured.

The method prefcribed by the Law for getting at fuch recompence is what is properly termed an action: therefore leaving Criminal Profecutions, by which punifhments are inflicted, to the difquifition of others, I will, in this Firft Part of my work take notice of the Injuries for which an Action may be brought, and by what Evidence it may be fupported; and alfo confider what Defence may be made by the perfon againft whom the Action is brought, and what is the proper Manner of taking advantage of it.

BOOK I.

For what Injuries affecting the Perſon an Action may be brought.

THE injuries on account of which an action may be brought, are ſuch as either affect the perſon, or the property of the party.

Thoſe which affect the perſon are,

1. Slander.
2. Malicious Proſecution.
3. Aſſault and Battery.
4. Falſe Impriſonment.
5. Injuries ariſing from Negligence or Folly.
6. Adultery,

CHAPTER I.

Of Slander.

SLANDER is defaming a man in his reputation by ſpeaking or writing words which affect his life, office, or trade; or which tend to his loſs of preferment in marriage or ſervice; or to his diſinheritance; or which occaſion any other particular damage.

If ſlander be ſpoken of a peer or other great man, it is called by a particular name, *Scandalum Magnatum*, and is puniſhable in a particular manner, *viz.* by impriſonment, by *Weſt.* 1. *c.* 34. as well as rendering damages to the perſon injured, to be recovered in an action founded upon the ſecond of *R.* 2. *tam pro*

4 Co. 12, 13. 2 Mod. 98. 166. Cro. Car. 135.

Domino rege quam pro seipso. And this statute is a general law of which the court will take notice, and therefore it need not be recited in the declaration, (yet if the plaintiff undertake to recite it and mistake in a material point, it is incurable :) but it must be shewn that the plaintiff was *unus magnatum* at the time of speaking the words, else the action will not be maintainable. It has been said there is a difference between an action grounded upon the statute *de scand. magn.* and a common action of slander; that the words in the one case should be taken *in mitiori sensu*, and in the other in the worst sense against the speaker, that the honour of such great persons may be preserved: But this difference seems no longer to subsist; because the old rule, that words shall be taken *in mitiori sensu* is now exploded, and the rule at this time is that they shall be taken in the same sense, as they would be understood by those who hear or read them, and for that purpose all the words ought to be taken together.

1 Vent. 60. Mo. 155.

Bradley and Messon, M. 10 G. 2.

2 Mod. 159.

Ward v. Reynold, Pas. 12 Ann.

The defendant said to the plaintiff, *I know you very well, how did your husband die?* The plaintiff answered, "As you may, if it please God." The defendant replied, *No, he died of a wound you gave him.* On not guilty, there was a verdict for the plaintiff; and on motion in arrest of judgment, the Court held the words actionable, for they are in the whole frame of them spoken by way of imputation. *Parker* Ch. J. said, it is very odd, that after a verdict a court of justice should be trying whether there may not be a case in which words spoken by way of scandal might be innocently said; whereas if that were in truth the case, the defendant might have justified.

Mich. 24 Car. 2. B. R.

Yet perhaps many words would be holden to be actionable in the case of a peer, that would not be deemed so in the case of a private person; as in the Marquis of *Dorchester*'s case, *temp. Car.* 2. "He is no more to be valued than that dog that lies there." So in the case of the Earl of *Peterborough* and *Stanton.* "The Earl of *Peterborough* is of no esteem in this country, no man of reputation has any esteem for him, no man will trust him for two-pence, no man values him in the country; I value him no more than the dirt under my feet."

How v. Prinn, Salk. 695.

In offices of profit, words that impute either defect of understanding, ability or integrity, are actionable; but in those of credit, words that impute only want of ability, are not actionable,

able, because a man cannot help his want of ability as he can his want of honesty: In either case charging him with inclinations and principles, which shew him unfit, is sufficient without charging him with any act; as to say of a justice of peace, or member of parliament, "he is a Jacobite, and for bringing in the Pretender." Ibid.

The charging another with a crime of which he cannot by any possibility be guilty (as killing a man who is then living) is not actionable, because the plaintiff can be in no jeopardy from such a charge, but such matter must be pleaded specially, and cannot be given in evidence on the general issue, otherwise than in mitigation of damages. 4 Co. 16.

An action lies not for the saying—"Thou art a thief, *for* thou hast stolen such a thing," (*ex. gr.* a tree) the stealing whereof appears to be no felony, for the subsequent words shew the reason of calling him thief; but when he says, "Thou art a thief, *and* hast stolen such a thing," the action lies for calling him a thief; and the addition "Thou hast stolen" is another distinct sentence by itself, and not the reason of the former speech, nor any diminution thereof. Cr. J. 114.

Though two persons say the same words, you cannot have a joint action; but where an action was brought against two for charging the plaintiff with felony, and procuring her to be indicted, it was holden good: For *crimen imponere* supposes an Act, and is a tort; and, like every other tort, may be proved against two, and one only be found guilty. Subly and Mott, Tr. 20 G. 2.

It was formerly holden that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them. Hower, if the words be laid in the third person, e. g. *He deserves to be hanged for a note he forged on A.* proof of words spoken in the second person, e. g. *You deserve*, &c. will not support the declaration: For there is a great difference between words spoken in a passion to a man's face, and words spoken deliberately behind his back. If the colloquium alledged be necessary to maintain the action, it must be proved; as where words are laid to be spoken of one with respect to his office or trade. So if it be laid that the defendant *in clausa ecclesiæ Litchfield* spoke the words, it has been holden that the place not being laid as a *Venue*, but as a Description of the offence, it is a circumstance that must be proved; but if

2 Ro. Abr. 718.

Avarillo v. Rogers, Guildhall Sittings, Trinity Term, 1773, before Lord Mansfield.

Savage and Roberts, Salk. 604. Per Denton at Strafford 1729.

Tr. per pais 390.

if the words are laid to be ſpoken before *A.* and others, it is ſufficient to prove them ſpoken in the preſence of others only.

Queen v. Drake, Salk. 160.

In an information for a libel in ſetting forth a ſentence, the word (nor) was inſerted for (not) but the ſenſe was not thereby altered; upon not guilty and a ſpecial verdict, the court ſaid *Cujus quidem tenor* imports a true copy. 2. This was not a tenor by reaſon of the variance. 3. There is a difference between words ſpoken and written; of the former there could not be a tenor, for want of an original to compare them with; and therefore where one declares for words ſpoken, variance in the omiſſion or addition of a word is not material, if ſo many of the words be proved and found as are in themſelves actionable: And *per Holt*, there are two ways of deſcribing a libel or other writing in pleading; by the words, or the ſenſe; by the words, as if you declare *Cujus tenor ſequitur*, and there if you vary it is fatal: By the ſenſe, that the defendant made a writing, and therein ſaid ſo and ſo; in which caſe, exactneſs of words is not ſo material.

M. 6. 216.

Rex v. Nutt, 2 G. 2. per Raymond, Guildhall. 1 Saund. 132.

And note, that it has been holden, that proof of a libel being ſold in a ſhop by a ſervant, though the owner know nothing of the contents, or of its coming in or going out, is ſufficient to convict the owner of the ſhop. In *Lake* and *King*, (which was an action for printing a libel) it was holden that an action would not lie for printing a petition to parliament, and delivering it to the members, it being agreeable to the courſe and proceedings in parliament. And *Cutler* and *Dixon*, 4 *Co.* 14. is to the S. P. But where *Oswood* exhibited a bill in the Star-chamber againſt Sir *R. Buckley*, and charged him with divers matters examinable in the ſaid court, and further that he was a maintainer of pirates and murderers, and a procurer of piracies and murders, it was holden that an action lay for the words not examinable in the ſaid court.

Str. 77. Rex v. Middleton.

N. B. If *A.* ſend a libel to *London* to be printed and publiſhed, it is his act in *London*, if the publication be there.

Gueſt and Loyd.

If an action be brought for words that are not in themſelves actionable, if the plaintiff do not prove the ſpecial damage laid in the declaration, he muſt be nonſuited, becauſe the ſpecial damage is the gift of the action; but where the words are of themſelves actionable, if the words be proved the Jury muſt find for the plaintiff, though no ſpecial damage be proved.

But

But though the words be in themselves actionable, yet the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration. Geare v. Britton, per Lee Ch. J. Mid. M. 1746.

And where he has once recovered damages, he cannot after bring an action for any other special damage, whether the words be in themselves actionable or not: But though he cannot give evidence of any loss or injury not laid in the declaration, yet after he has proved the words as laid, he may give evidence of other expressions made use of by the defendant, as a proof of his ill will towards him. Fitter v. Veal, Ca. K. B. 542. Geare v. Britton.

In an action for words *per quod matrimonium amisit* with *J. S.* for the defendant it was proved that *J. S.* was the plaintiff's aunt, and therefore could not marry him; but *per Raymond* and *Withens*, the right of the marriage shall not now be tried; it is sufficient that they intended to marry, and that the woman for that cause refused: *Tamen Q.* Whether such determination can be supported by any principle of law? The Case of Sir Ch. Gerard's Bailiff, at Nisi Prius, Tr. 36 Car 2.

If an action be brought for calling the plaintiff's wife a bawd, *per quod J. S.* has left off coming to the house, the special damage being the gist of the action, it ought not to be laid *ad damnum ipsorum*; but where the action is brought for word in themselves actionable, and no special damage laid, there such conclusion is right, for the action survives: And *note*, That saying generally, *per quod* several persons left his house, without naming any, is not laying a special damage. 1 Lev. 140. Grove & Ux' v. Hart, Tr. 25 G. 2. Ibid.

In an action for these words, "You are a thief, and I will prove you so:" The plaintiff declared, that by reason of these words, one *John Merry*, and divers other persons, who were his customers, left off dealing with him. Upon the trial the plaintiff proved the words, and the special damage as to *Merry*, and would have gone on as to the others; But per *Raymond* Ch. Just.—Where the words are not actionable, but the special damage is the gist of the action, this sort of evidence is allowed, though the particular instances of such damages are not specified in the declaration; but where the words are actionable, particular instances of such damages shall not be given in evidence, unless particularized in the declaration. However, he admitted the plaintiff to give general evidence of the loss of customers: But modern practice does not seem to warrant this distinction. Browning v. Newman, Stra. 666.

Edmondson v. Stephenson & Ux' Sittings at Westminster after East. 6 G. 3. K. B.

Where words are spoken in confidence and without malice, no action lies; therefore where *A.* a servant, brought an action against her former mistress for saying to a lady who came to inquire for the plaintiff's character, that she was saucy and impertinent, and often lay out of her own bed; but was a clean girl, and could do her work well; though the plaintiff proved that she was by this means prevented from getting a place; yet *per* Lord *Mansfield*, this is not to be considered as an action in the common way for defamation by words; but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved. That it was a confidential declaration, and ought not to have been disclosed. But if without ground, and purely to defame, a false character should be given, it would be a proper ground for an action.

Cro. El. 541.

Herver v. Dowson C. B. Sittings after T. 5 Geo. 3.

So in an action for saying of the plaintiff, who was a tradesman, "He cannot stand it long, he will be a bankrupt soon;" where special damage was laid in the declaration, *viz.* That one *Lane* refused to trust the plaintiff for a horse: *Lane*, the person named in the declaration, was the only witness called for the plaintiff; and it appearing on his evidence, that the words were not spoken maliciously, but in confidence and friendship to *Lane*, and by way of warning to him, and that in consequence of that advice he did not trust the plaintiff with the horse. *Pratt* C. J. directed the jury, that though the words were otherwise actionable; yet if they should be of opinion, that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty; and they did so accordingly.

Anger v. Wilkins, Mich. 6 G. 2. 1 Barnes 337.

After verdict for the plaintiff, and damages intire, where some of the words are not actionable, the court on motion will grant a *venire facias de novo* on payment of costs, that the plaintiff may sever his damages.

10 Co. Osborn's Case, S. P.

But if the words be in one count, the court will intend that such as are not actionable were added only to shew the malice of the party, and that the damages were given for what were actionable.

4 Co. 13. 2 Mod. 166. 1 Saund. 120. Burr. 107. Carpenter v. Tarrant. M. 30 G. 2. B. R.

The defendant may justify in an action of *Scandalum Magnatum*, or for a libel, the same as in a common action of slander; and therefore it is not necessary in either case for the plaintiff to aver, that the words or charge are not true, for that is supplied by the allegation that the defendant spake or published

them

them falsely and maliciously, and it lies upon the defendant to plead that the fact was true by way of justification; and he cannot properly give the truth of the fact in evidence upon not guilty in an action for words, otherwise than in mitigation of damages, and that too under many restrictions; as where the words amount to a charge of felony or treason, for this brings no inconvenience on the defendant who may plead it in bar, and then the time must be ascertained, which might enable the plaintiff to give contrary proof, or to reply several things, of which he would lose the benefit on the general issue; but in such case the defendant may give in evidence the manner and occasion of speaking the words in mitigation; and if the words were spoken through sorrow and concern, and not maliciously, the plaintiff shall be nonsuited; so he may give in evidence a confession of the plaintiff of his being an accessary, for he could not plead that in bar; besides a confession in the case of a witness may be given in evidence; though you cannot give in evidence any particular crime that he has committed, but only general character. So where the words import a general charge of a crime not capital, the defendant will not be permitted to give the truth in evidence; as where the words were "Thou preachest nothing but lies from the pulpit;" but if the words charge a particular crime upon the plaintiff, which is not capital, *ex. gr.* adultery with *J. S.* it has been holden that the defendant may give that in evidence in mitigation of damages; though he cannot give in evidence the commission of a like crime with any other.—However in *Underwood* and *Parks*, *Lee* Ch. Just. said it was now a general rule not to suffer the truth of the words to be given in evidence on not guilty in any case.

Smith v. Richardson, Mich. 12 G. 2.

1 Lev. 82.

Cited in Smith and Richardson as determined by Holt Ch. J.

Bp. of Sarum v Nash. per Parker Ch. J.

Smithies v. Harrison, per Holt, 1 Raym. 727.

Str. 1200.

In the case of the King and *Baker*, which was an information against the defendant, for publishing a libel against Mr. *Swinton* of *Wadham* college, *Oxon*, accusing him of sodomitical practices, *Lee* Ch. Just. refused to let the defendant give evidence of his reasons for doing it, *viz.* That the supposed pathic told him so; for he said the only question was, Whether the defendant were guilty of printing and publishing the libel; and though it be offered by way of mitigation only, yet in fact it amounts to a justification; and it has always been holden that the truth of a libel cannot be given in evidence by way of justification; because

Tr. 13 & 14 G. 2.

cause if the person charged with any crime be guilty, he ought to be proceeded against in a legal way, and not reflected upon in this manner.

Collinson v. Loder, Oxon 1750. However, where the plaintiff having brought an action against the defendant for saying, "He was a buggerer, and that he caught him in the fact," after proving the words, gave in evidence the defendant's saying at another time, that "He was guilty of sodomitical practices." Mr. Justice *Burnet*, upon considering the case of *Smith* and *Richardson*, permitted the defendant to give in evidence the truth of those words, for the action not being brought for speaking them, the defendant had no opportunity of pleading that they were true; and therefore, as the plaintiff has proved the speaking of them in aggravation, the defendant ought to be permitted to shew they were true in mitigation.

C. J. 91. The defendant may by way of justification plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question; or he may justify the speaking of them through concern, or the reading of them as a story out of a history; or he may shew by the dialogue, that 4 Co. 13. Cr. J. 91. they were spoken in a sense not defamatory; or he may give these matters in evidence upon the general issue, for they prove him not guilty of the words maliciously. But in an action G. Hall 1751. brought by the master of a ship against a merchant at *Bristol*, for saying his vessel was seized and he put into prison at —— for running corn, Lord Ch. Just. *Lee* held, that proof of the defendant's having heard it read out of a letter, and that he only reported the story, was no justification; but that every person was answerable for the slander he reported of another, and the jury accordingly gave 150*l.* damages.

2 Lev. 121. Note, If the justification be local, as that he stole plate at *Oxon*, the trial ought regularly to be in the same county in 1 Saund. 247. which the justification arises. But this would be aided after a verdict by 16 & 17 *Car.* 2. *c.* 8.

Brown and Gibbons, Salk. 206. Note, By 21 *Jac.* 1. *c.* 16. if the damages be under 40*s.* the plaintiff shall have no more costs than damages; but it has been said, that the jury are not bound by this statute, and therefore may give 10*l.* costs where they gave but 10*d.* damage. However it does not extend to such cases, where the conse-

conſequential damage is the gift of the action; as for calling a woman whore *per quod* ſhe loſt her cuſtomers.—So for calling a man thief, and cauſing him to be arreſted, if the defendant be found guilty of both. Cro. Car. 163.

But it has been holden, that where the words are of themſelves actionable, and ſpecial damages are laid by way of aggravation, though they be proved, yet if the damages recovered are under 40 *s.* there ſhall be no more coſts than damages; for it is properly an action for words within the ſtatute 21 *Jac.* 1. *c.* 16. Raym. 1588. Baker v. Hearn, B. R. Hil. 7 G. 3.

By the ſame ſtatute, the action muſt be commenced in two years after the words ſpoken; but note, this does not extend to *Scandalum Magnatum*, nor to caſes where the ſpecial damage is the gift of the action. But where the words are of themſelves actionable, ſpecial damage will not take them out of the ſtatute. Litt. Rep. 342. 1 Sid. 95. Saunders and Edwards.

CHAPTER II.

Of Malicious Proſecutions.

IN many caſes an action will lie for a malicious proſecution: however there is a great difference between a civil ſuit and an indictment. It is not actionable to bring an action though there be no good ground for it, becauſe it is a claim of right, and the plaintiff finds pledges to proſecute, and is amerciable *pro falſo clamore*, and is liable to coſts; but an action on the caſe will lie for ſuing the plaintiff in the ſpiritual court *ſine aliquâ cauſâ*, and cauſing him to be excommunicated *falſe, fraudulenter et malitioſe*, without giving him any notice, *per quod* he was put to great coſts. Savil and Roberts, 1 Salk. 14. 1 Raym. 374.
If a man ſue in the ſpiritual court for a matter which appears by his libel not to be ſuable there, and over which that court has no juriſdiction, an action on the caſe will lie; for it is a ſuit for vexation: but not if the ſuit be for a thing demandable there by any thing which appears by the libel, and barred only by the defendant's plea or by collateral matter: as where inſti- Lady Waterhouſe, v. Bawd, Cr. J. 132.

tuted

Savil and Roberts.

tuted for tithe of wood, which is timber. So an action will lie if one who has a cause of action to a small sum, or has no cause of action at all, maliciously sue the plaintiff, with intent to imprison him for want of bail, or do him some special prejudice; but then it is not enough to declare generally, but he must shew the special grievance; he must set out, that being indebted to the defendant in so much, he sued out such a writ for so much more, on purpose to hold him to bail. And if the writ be not returned, he must have a rule on the sheriff to return it, that he may have it to give in evidence. But if a stranger procure another to sue me causelessly, I may have an action against him generally.

1 Saund. 228. 1 Vent. 12.

Robins and Robins, Salk. 15. Savil and Roberts.

Hob. 206. 266.

Waterer brought an action on the case against *Freeman* for suing a second *fieri facias*, and having his goods taken in execution thereupon, after goods taken upon a former *fieri facias*. The defendant having been found guilty moved in arrest of judgment, because it was a legal suit. *Hobart* Ch. Just. delivered the opinion of the court for the plaintiff, but said, *if the defendant had not known* of the cattle first taken, he had not been liable to the action; but now to the main point (says Lord *Hobart*) We hold that if a man bring an action upon a false surmise in a proper court, he cannot bring an action against him and charge him with it as a fault directly, as if the suit itself was a wrongful act; and cited 43 *E.* 3. 33. The plaintiff brought an action of false imprisonment, the defendant pleaded that he caused him to be imprisoned upon a statute; the plaintiff replied, there was a day given upon defeasance to pay, and that he paid before the day; and yet it was ruled against the plaintiff, because he was imprisoned by due course of law.—But on the contrary, if you charge me with a crime in a court no way capable of the cause, I shall have an action for it. 4 *Co.* 14. So if a man sue me in the spiritual court for a mere temporal cause.—Now to the principal case; if a man sue me in a proper court, yet if his suit be utterly without ground of truth, *and that certainly known to himself*, I may have case against him, for the undue vexation and damage that he putteth me unto by his ill practice. But two cautions are to be observed to maintain actions in these cases, 1. The new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust. 2. That there must be not only a thing done amiss, but also a damage, either already

Farrel v. Nun, B. R. Tr. 5 G. 3. S. P. 1 Str. 114. S. P.

already fallen upon the party or else inevitable; and therefore if a man forge a bond in my name, I can have no action till I am sued upon it.

Case for that the defendant *machinans* to deprive him of his liberty, *absque aliqua probabili causa prosecutus fuit quoddam breve de privilegio* out of the court of C. B. and after he had put in an appearance, that the defendant knowing he had no probable cause suffered himself to be nonsuited. After verdict on not guilty, it was moved in arrest of judgment, that the action would not lie. *North* Ch. Just. said the contrary is adjudged in *Hob.* 266. and that upon good reason, and it is in the discretion of the Judge to direct the jury, if there be manifest proof that there is no cause of action; and *Ellis* said, that the cause was tried before him, and that it was apparent *the suit was merely vexatious.* Martin and Lincoln, Mic. 27 Car. 2. C. B.

If a man be falsely and maliciously indicted of any crime, that may prejudice his fame and reputation, he may bring his action. So if he be indicted of a crime that subjects him to peril of life or liberty. So though it touch neither his fame nor liberty; for it is injurious to his property by putting him to a needless expence. And the action may be brought as well against one who procures others to indict, as against the prosecutor. Savil and Roberts. Stiles 10.

Where a man is falsely and maliciously indicted of a crime which hurts his fame, and which is a scandal to him, though the indictment be insufficient, or an ignoramus found; yet an action lies for the slander, because the mischief of that is effected. So if it endangered his liberty, and he were actually imprisoned; though it has been said to be otherwise, where it only concerns his property; for he cannot suffer in that in either of those cases. But this diversity between a malicious prosecution upon a good indictment, and a bad one has been denied; and it is now holden that an action will lie as well for damage by expence, as by scandal or imprisonment, though the indictment be insufficient; and therefore it may be brought by a husband for the expence of defending his wife. Savil and Roberts. Chambers *v.* Robinson. Str. 691. Cr. J. 490. Jones and Gwin, H. 12 An. Salk. 15. Str. 977. 691. Smith and Hickson, Pasc. 1734.

The plaintiff must produce and prove a copy of the acquittal on record, and the substance of the evidence given on the indictment is material, and the charges of the acquittal, and the circumstances which shew the prosecution was malicious and without probable cause; he may likewise give in evidence the circumstances of the defendant, in order to increase the damages. Clayton and Nelson, P. 1712. Parker Ch. J. Midd.

In an action for maliciously holding to bail, the Court held 1st. that it was not necessary to prove that there was any affidavit to hold to bail, for the indorsement on the writ is sufficient: 2dly. that if the declaration had averred that such an affidavit had been made, an office copy of it would have been sufficient. But if it were stated to have been made by the defendant himself, perhaps the original affidavit must be produced and proved.

Croke v. Dowling. East. 22 G. 3.

If the action be brought against several, and one only be found guilty, it is sufficient; for there is a great difference between this action on the case in nature of a conspiracy, and a writ of conspiracy at common law; for in this case the damage sustained is the ground of the action.

Carth. 416.

He that gets off upon a *non pros* does not get off at all on the merits of the cause; and to maintain a conspiracy, it is necessary to lay and prove an acquittal; and therefore a *nolle prosequi* will not maintain the declaration, but if he plead not guilty, and the attorney general confess it, that will do.

Goddard and Smith, Salk. 21. 6 M. 261.

The defendant's name upon the back of the bill is a sufficient evidence, and the best of the defendant's being sworn to the bill: but it may be proved that he was a witness without having the bill; but a person's name being indorsed on the indictment, is no evidence of his being a prosecutor.

1 Vent. 47.

But though an action do lie for a malicious prosecution, yet it is not to be favoured; and therefore if the indictment be found by the grand jury, the defendant shall not be obliged to shew a probable cause: but it shall lie upon the plaintiff to prove express malice.

Savil and Roberts.

The action ought not to be maintained without rank and express malice and iniquity. The grounds of it are, on the plaintiff's side, innocence; on the defendant's, malice.

Per Holt C. J. 12 Mod. 208. Per Parker C. J. 10 Mod. 217.

However, as it may come to be left to a jury, it is adviseable for the defendant to give proof of a probable cause, if he be capable of doing it; and for this purpose proof of the evidence given by the defendant on the indictment is good. And where the facts lie in the knowledge of the defendant himself, he must shew a probable cause, tho' the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice.

Cobb and Car. Midd. Mic. 1746.

Parrot v. Fishwick, London, after Trinity 1772.

If the plaintiff do prove malice, yet if the defendant shew a probable cause, he shall have a verdict, and the judge, not the jury, is to determine whether he had a probable cause; and therefore, where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury obtained a verdict, upon a motion for a new trial the court set it aside (it appearing upon the report of the judge, that there was a probable cause) not as a verdict against evidence, but as a verdict against law.

Golding v. Crowle, M. 25 G. 2.

When

When the action is for a malicious prosecution for felony, the first part of the defendant's defence must be to prove a felony committed; and therefore if nobody were by at the time of the supposed felony but the defendant or his wife, their oath at the trial of the indictment may be given in evidence to prove the felony. **6 Mod. 216. Johnson and Ux. v. Browning.**

In an action for a malicious prosecution against the prosecutor and the justice of peace who committed the plaintiff, the jury gave 200 *l.* against the prosecutor, and 20 *l.* against the justice; and *King* Chief Justice ordered the verdict to be so taken. **Lane and St. Loe' & al' Str. 79. Post. 93.** But in *Lowfield* and *Bankcroft*, *Trin.* 5 *Geo.* 2. Lord *Raymond* in the like action, where the jury would have given 800 *l.* against one and 100 *l.* against each of the other three, said it could not be done, and there was a verdict against all for 1100 *l.* **Str. 910.**

CHAPTER III.

Of Assault and Battery.

IN treating of the action of assault and battery, it will be necessary to see what the law looks upon as such. **Queen v. Ingram, Salk. 384.** And first, an assault is an attempt or offer by force or violence, to do a corporal hurt to another, as by pointing a pitchfork at him, when standing within reach; presenting a gun at him; drawing a sword, and waving it in a menacing manner, &c. But no words can amount to an assault, though perhaps they may in some cases serve to explain a doubtful action; **1 Hawk. P. C. 133. 1 Mod. 3. S. P.** as if a man were to lay his hand upon his sword, and say, "if it were not assize time, he would not take such language:" These words would prevent the action from being construed to be an assault, because they shew he had no intent to do him any corporal hurt at that time. Secondly, a battery, which always includes an assault, is the actual doing an injury, be it ever so small, in an angry, or revengeful, or rude, or insolent manner; as by spitting in his face, or violently justling him out of the way. But if two by consent play at cudgels, and one hurt the other, it is no battery; so if one soldier hurt another in exercise; but if he plead it, he must set forth the circumstances, so as to make it appear to the court, that it was inevitable, and that **Dalt. cap. 22. tamen vide post. case of Boulter and Clerk. Hob. 134.**

that he committed no negligence to give occasion to the hurt: for it is not enough to ſay, that he did it *caſualiter et per infortunium, contrà voluntatem ſuam*, for no man ſhall be excuſed a treſpaſs, unleſs it may be juſtified intirely without his default; and therefore it has been holden, that an action lay where the plaintiff, ſtanding by to ſee the defendant uncock his gun, was accidentally wounded. *Trin.* 10 *Geo.* 1. *Underwood* and *Hewſon per Forteſcue* and *Raymond*, in *Midd. Str.* 596.

Short and Lovejoy coram Lee Ch. Juſt. G. Hall 1752.

And much more, if a man wantonly do an act by which another man is hurt; as by puſhing a drunken man, he will be anſwerable in an action of aſſault and battery, but if he intend doing a right act, as to aſſiſt ſuch drunken man, or prevent him from going along the ſtreet without help, and in ſo doing, an hurt do enſue, he will not be anſwerable.

4 Mod. 405. Gibbons and Pepper.

Where by a ſudden fright a horſe runs away with his rider, and runs againſt a man, it is no battery; and may be given in evidence on the general iſſue; but if it were occaſioned by any one whipping the horſe, ſuch perſon would certainly be liable in an action upon the caſe; and, *quære*, in the other caſe, if the plaintiff were to prove that the horſe had been uſed to run away with his rider, for in ſuch caſe the rider is not free from blame.

Rex v. Warden of Fl[illegible]. Ca. R. B. 339. at bar. Poſt. 233. 239.

The plaintiff cannot give in evidence a conviction at the ſuit of the king for the ſame battery; for it is a general rule, that no record of conviction or verdict ſhall be given in evidence, but ſuch whereof the benefit may be mutual, *viz.* ſuch whereof the defendant, as well as plaintiff, might have made uſe, and given in evidence in caſe it had made for him.

Boulter and Clark, at Abingdon 1747. ante Dalt. 22.

In an action of aſſault and battery, Mr. ſerjeant *Hayward* would have proved that the plaintiff and the defendant fought by conſent, and inſiſted that this was evidence on the general iſſue in bar of the action, for *volenti non fit injuria.* But *Parker* Chief Baron denied it, and ſaid, the fighting being unlawful, the conſent of the plaintiff to fight (if proved) would be no bar to his action, and that he was intitled to a verdict for the injury done him; and cited *Winch* 49. 2 *Lev.* 174. and *Webb* and *Biſhop* at *Glouceſter Lent Aſſizes* 1731, before Lord Ch. Baron *Reynolds*, where in an action for five guineas on a boxing match, the judge held it an illegal conſideration, and the plaintiff was nonſuited. *Comb.* 218. *Matthew* and *Ollerton*, where it was ſaid, that if a man licenſe another to beat him, ſuch

ſuch licence is void, becauſe it is againſt the peace; and thereupon the plaintiff had a verdict, and 30 s. damages.

There are three ſorts of defence to this action. Hob. 134.

1. Inficiation.
2. Matter of excuſe.
3. Juſtification.

Inficiation is the denying of the fact, and that can only be by pleading the general iſſue, *viz.* not guilty. On which plea in general, matter of juſtification cannot be given in evidence in mitigation of damages. But where an action was brought againſt the captain of a ſhip, who pleaded not guilty, the defendant croſs examined the plaintiff's witneſs as to expreſſions uſed by the plaintiff, which would have juſtified the impriſonment, they tending to raiſe mutiny and diſobedience; and though it was objected to by the plaintiff, the evidence of what was ſaid by him *at the time* of the impriſonment was received in mitigation of damages. For every thing which paſſed *at that time* is part of the tranſaction on which the plaintiff's action is founded; and he could not be ſurprized by his evidence. Bingham v. Garnault, Sittings in London on 5 April, 1783 cor. Buller J.

Matter of excuſe is an admiſſion of the fact; but ſaying it was done accidentally, and without any default in the defendant; and that (as I have already ſaid) may be either pleaded or given in evidence on the general iſſue.

Juſtification is an inſiſting upon ſomething that made it lawful for him to do the fact laid to his charge; it is therefore to be ſeen what is ſufficient matter of juſtification. The moſt general matter of juſtification is, that the plaintiff made the firſt aſſault, and if iſſue be joined thereupon, the defendant may prove an aſſault on any day before the action brought; and the plaintiff cannot give in evidence a battery at another day, or at another time in the ſame day, without a novel aſſignment, which muſt ſtate the battery to be on the ſame day mentioned in the declaration, elſe it will be a departure; though on ſuch novel aſſignment he may give in evidence a battery at any other day, the ſame as he might if the defendant had pleaded not guilty to the declaration; but as the common way is for the plaintiff to have two or three counts in his declaration, ſo that the defendant is under a neceſſity of pleading the general iſſue to ſome of them (for if he juſtify two he admits two, and conſequently, unleſs he can prove two juſtifications, muſt have a verdict againſt him) he may prove another battery without being put to make a novel aſſignment. Gr. J. 367. Cr. Car. 229, 514, 15.

The memorandum was generally of *Michaelmas* term, and the fact on *ſon aſſault* was proved on a day within the term, and on a caſe made, the court held it well enough; for the plaintiff need have given no evidence on this plea, unleſs to aggravate damages, and the court will not nonſuit him, be- Str. 1271.

cause it is amendable by a new bill. And if this had come out on the defendant's evidence, who had otherwise proved his plea, he ought to have a verdict, unless the plaintiff prove another battery previous, which in such case ought to be deemed the foundation of the action.

If the defendant prove that the plaintiff first lifted up his staff, and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him.

Cockcroft and Smith, Salk. 642. Dance and Lucy, Sid. 246.

However every assault will not justify every battery; but it is matter of evidence whether the assault were proportionable to the battery, and therefore, though the plaintiff set out a *maihem* in his declaration, yet the plea of *son assault* demesne is the same; and he need not plead that the plaintiff *maihemasset et vulnerasset* the defendant, *nisi, &c.* But that must appear in evidence; that is, it must appear that the assault was in some degree proportionable to the *maihem*; and therefore in *Cockcroft* v. *Smith*, *Holt* Ch. Just. directed the jury to give a verdict for the defendant, the first assault being by tilting the form on which the defendant sat, whereby he fell; the maim was, that the defendant bit off the plaintiff's finger.

1 Raym. 177.

King & Ux' v. Phippard, Carth. 280.

If the defendant plead *son assault*, and the plaintiff can justify it, he must plead it, for he cannot give it in evidence upon the general replication *de injuriâ suâ propriâ*.

1 Haw. P. C. 130.

There are many other matters which may be pleaded in justification: as if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; so if a parent in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar; or a gaoler his prisoner; or if I beat one who wrongfully endeavours with violence to dispossess me of my lands or goods, or who assaults my wife, parent, child, or master: but though all these matters may be pleaded in justification, yet they must be pleaded differently; as for example: in assault and battery against husband and wife for a battery by the wife, the defendants may plead that the plaintiff was going to wound her husband and that she *insultum fecit* to defend him and to prevent the plaintiff from beating him: in the same manner a servant may justify an assault in defence of his master; but not *e con'*, because the master may have an action *per quod servitium amisit*, but the servant can have no action

Ray. 62.

for

for an assault on his master. A man cannot justify a battery in defence of his possession; but he ought to say, *molliter manus imposuit*: so an officer cannot justify more than the assault by virtue of an arrest, without shewing that the plaintiff resisted, or endeavoured to rescue himself, unless it be by way of *molliter manus imposuit*, and in that manner he may justify the beating, without shewing any resistance, or attempt to rescue. Williams and Jones, Str. 1049. Titley v. Foxhall, C. B. Tr. 31 G. 2.

A battery cannot be justified on account of breaking his close, in law, without a request to depart; but it is otherwise, if he come into my close *vi et armis*; for that is but returning violence with violence. Green and Goddard, Salk. 641.

In assault and battery, the defendant pleaded, that he was seised of the rectory of *D.* in fee, and that the corn was severed from the nine parts, and for that the plaintiff would have carried away his corn, the defendant stood in defence thereof, and kept the plaintiff from carrying it away; so as the harm the plaintiff received was of his own wrong, &c. The plaintiff replied, *de injuria sua propria absque tali causa*; and upon demurrer the replication was holden to be good, because the plaintiff claimed nothing in the land or corn, but only damages for the battery, which is collateral to the title, and therefore a general replication was good; for in assault and battery, the possession can only be material; but it is otherwise when the right may come in question. Taylor v. Markham, Cr. J. 224. Yelv. 157.

The defendant may justify even a *maihem*, if done by him as an officer in the army for disobeying orders; and he may give in evidence the sentence of the council at war upon a petition against him by the plaintiff: and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant. Lane and Hegberg, H. 11 W. 3. per Treby C. J. G. Hall. Salk. MSS.

Whenever the defendant justifies a battery, he must confess it, otherwise on demurrer the plaintiff will have judgment. Salk. 637.

Where there is an express battery laid, it is not enough to justify the imprisonment (though that includes a battery) but he must likewise justify the battery.

A former recovery in assault and battery is a good plea, notwithstanding subsequent damages; for the consequence of the battery is not the ground of the action, but the measure of the damages. Fetter and Beale, Salk. 11.

Yelv. 68. So if a battery be committed by several, and a recovery be had against one, such recovery may be pleaded in bar to an action for the same battery brought against another.

Cr. J. 151. Candish's cause. If the defendant justify the assault, and plead not guilty to the battery and wounding, and both pleas are found against him, there shall be but one damages given, for the assault is included in the battery. 11 Co. 6. 7. Sir J. Heydon's case. So if the action be brought against two, and one plead not guilty, and the other *son assault*, and both issues are found for the plaintiff, there shall be but one damages assessed; and it would be the same if one of the defendants had pleaded specially, and there had been a demurrer which had been determined in favor of the plaintiff: 1 R. R. 395. Cr. J. 349. for it is a maxim, that where the enquest is taken by the issues of the parties, by the same enquest shall the damages be taxed for all. Rodney and Strode, Carth. 19. Post. If the jury assess damages severally, *viz.* 1000 *l.* against *A.* and 50 *l.* against *B.* the plaintiff may enter a *nolle prosequi* as to *B.* and take judgment against *A.* only for the 1000 *l.* for as the plaintiff might have brought his action jointly or severally, he may have the same election as to the damages; or he may take execution against both for the greater damages; so if one of the defendants confess the action, a writ of enquiry shall be awarded, but shall not issue, because he shall be contributory to the damages taxed by the enquest on the issue of the parties, if they shall find for the plaintiff; and if they shall find against the plaintiff, then the writ shall issue forth. It is the constant practice now to let the writ issue so that the same jury tries the issue and assesses the damages; Str. 1222. and in case the defendant who pleaded, is acquitted, yet the plaintiff shall go on to assess damages against the others; (*aliter* if the plaintiff be nonsuited. *Str.* 507.) So if one defendant appear, and the plaintiff declare against him *simul cum*, *&c.* who pleads and is found guilty by the enquests to damages; and afterwards, the other comes and pleads, and is found guilty, he shall be charged with the damages taxed by the former enquest; for the trespass, which the plaintiff has made joint, cannot be severed by the jury, 11 Co. 5. ante, post. if the jury find the trespass to be done by all at one and the same time; but if the jury find one guilty at one time, and the other at another time, there several damages may be assessed.

9 E. 4. 51. Cr. J. 655. Trespass by baron and feme for the battery of both, defendant pleaded not guilty, and found guilty, and damages assessed for the battery of the baron by itself, and for the battery of the feme

feme by itself; and judgment was given for the damages for the battery of the feme; and the writ abated for the residue. Note, the defendant cannot in such action give evidence, that the man has a former wife, for that ought to be pleaded, that he may be apprised of the defence, and be prepared to answer it. In assault and battery, the defendant gave in evidence his marriage with the plaintiff; to encounter which she proved a former marriage to one *Westbrooke*, who was alive at the time of her second marriage; for the defendant it was insisted, she ought not to give felony in evidence to support her action, but Lord *King* admitted it.

Str. 430. Dickens & Ux' v. Davis M. 8 G. 1. per Pratt C. J.

Str. 79. Westbrooke and Stretvil.

In an action by husband and wife, for a battery on her, *per quod* the husband's business remained undone; on motion in arrest of judgment it was holden good, because the battery itself is actionable, and the *per quod* only aggravation; and *Holt* said he would not intend the judge suffered that to be given in evidence.

Salk. 119.

Str. 1094.

If there be a maim, or if the wound be apparent though not a maim, the court may increase the damages upon view of the plaintiff. But in order for it, it seems necessary that the judge of *nisi prius* should indorse upon the *postea*, what maim or wound was proved; unless the cause were tried before a judge of the same court where the motion is made to increase the damages. It likewise seems necessary that the manner of wounding should be set forth in the declaration. *Stiles* 345.

1 Raym. 176. Cook and Beal.

Latch. 223.

Viner, tit. Damages, K. pl. 47.

In *Smallpiece* and *Bockingham Mic.* 27 *Car.* 2. *C. B.* upon a motion to increase damages *super visum vulneris*, the court said, it was necessary that it should be proved to be the same wound for which the damages were given, and ordered notice to be given to the defendant who appeared, and witnesses on the one part and on the other were examined, and several of the jurymen, who all said that no evidence was given to them that any blow was given upon the eye, or that he had lost his eye by the battery; and for this reason the court would not increase the damages: for new evidence ought not to be given, for this is a censure on the first verdict, and a correction of it.

In *Burton* and *Baynes*, *M.* 7 *G.* 2. *C. B.* upon view of the party, and examination of the surgeon *ore tenus* in open court, and hearing counsel on both sides (after a rule to shew cause) the damages were increased from 11 *l.* 14 *s.* to 50 *l.*

1 Barnes 106.

It may not be useless here to remark, that by the *Jewish* constitution he that hurt his neighbour was responsible on five ac-

counts, 1. For the damages. 2. For the pain. 3. For the cure. 4. For the ceſſation of work. 5. For the affront or diſgrace.

It is proper to take notice, that by the 21 *J.* 1. *c.* 16. an action for an aſſault and battery muſt be brought within four years. But this muſt be taken advantage of by pleading, and therefore where the plaintiff by miſtake pleaded *non culp. infra ſex annos*, upon demurrer it was holden to be an ill plea. Salk. 423.

CHAPTER IV.

Of Falſe Impriſonment.

Co. L. 253

EVERY reſtraint of a man's liberty under the cuſtody of another, either in a gaol, houſe, ſtocks or in the ſtreet, is in law an impriſonment; and whenever it is done without a proper authority, is falſe impriſonment, for which the law gives an action; and this is commonly joined to an aſſault and battery; for every impriſonment includes a battery, and every battery an aſſault.

Coventry v. Apſley, Salk. 420. poſt. 24. S. P.

The 21 *J.* 1. limits this action to four years; but if an action be brought for detaining the plaintiff in priſon, from —— to ——, and the defendant plead (as he may) as to part not guilty *infra quatuor annos*, the plaintiff may reply that it was one continued impriſonment; and ſo ouſt the defendant of the benefit of the ſtatute.

Str. 1095. Webb and Turner.

Declaration of *Mich.* term, of an aſſault on the 18th of *October*, and an impriſonment from thence for twenty-five weeks; on motion in arreſt of judgment, the court held that the continuance being laid under a *ſcilicet*, will not vitiate what is properly laid in time, and that this differs from all the caſes where the time is affirmatively laid.

Doyley and Whiter Cr. J. 323.

Treſpaſs againſt *J. G* widow; and pending the ſuit ſhe took huſband; after judgment a writ was directed to the ſheriff *quod caperet* J. G. *ad ſatisfaciendum*, upon which the ſheriff took the defendant; whoſe huſband, together with her, thereupon brought an action of falſe impriſonment againſt the ſheriff, who juſtified under the *ca. ſa.* the plaintiff demurred; and *per cur.* If an action be brought againſt a widow, who

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who before judgment takes an husband, yet if she be found guilty, the *ca. sa.* shall be awarded against her, and not against her husband, and judgment for the defendant.

Where an officer and another join in the same justification, if it be not sufficient for the officer, neither is it for the other; and wherever an officer justifies an imprisonment under a writ which he ought to return (and all mesne process ought to be returned) he must shew that the writ was returned; but it is otherwise in the case of a subordinate officer, such as a bailiff, for he is only to execute the sheriff's warrant. If the action be brought against him who was plaintiff, he cannot justify by virtue of an execution, unless he likewise shew there is a judgment; for the judgment may be reversed, and it ought to be at his peril that he takes out execution afterward: but it is enough for the sheriff to shew a writ, and if any one come in aid of the officer at his request, he may justify as the officer may do, but such request is traversable.

Middleton and Price E. 16 G. 2. Str. 1184. Smith and Boucher, Str. 993.

Britton and Cole, Salk. 409.

The officer cannot justify an imprisonment for non-payment of taxes, under the general printed warrant which the collectors have, signed by two justices; but he ought to have a special warrant.

1 Raym. 740.

The defendant justified an imprisonment for that the plaintiff was indebted to him in a debt of 20*l.* and he took out a *latitat* against him directed to the sheriff, *&c.* which is the same imprisonment, *&c.* The plaintiff in his replication traversed that he owed him so much money; after verdict for the plaintiff it was moved in arrest of judgment, that the debt being but inducement to the justification was not traversable, and a repleader was awarded.

Hillyfield v. Stanyford, Mic. 25 Car. 2. C. B.

Note, that by 21 *Jac.* 1. *c.* 12. justices of the peace, mayors, bailiffs, churchwardens, and overseers of the poor, constables and other peace officers, may plead the general issue, and give the special matter in evidence. It likewise enacts, that any action brought against them, shall be laid in the proper county; and if upon the general issue pleaded, the fact shall appear to be done in another county, the jury shall find the defendant not guilty.

Note likewise, that by 24 *G.* 2. *c.* 44. no writ shall be sued out against a justice for what he shall do in the execution of his office, till notice in writing of such intended writ shall have been delivered to him, or left at the usual place of his abode, a month before; and the justice may tender

 amends,

amends, and in caſe the ſame is not accepted, plead ſuch tender in bar to the action, together with the plea of not guilty, and any other plea with leave of the court; and if upon iſſue joined thereon the jury ſhall find the amends ſo tendered to have been ſufficient, then they ſhall give a verdict for the defendant. It likewiſe enacts, that no action ſhall be brought againſt any conſtable or other officer, or any other perſon acting by his order, for any thing done in obedience to a juſtice's warrant, until demand made of the peruſal and copy of ſuch warrant, and the ſame has been refuſed for the ſpace of ſix days; and in caſe the warrant be ſhewed and a copy taken, and afterwards an action be brought againſt the conſtable, without making the juſtice a defendant, the jury ſhall on producing the warrant find a verdict for the defendant, notwithſtanding any defect of juriſdiction in the juſtice; and if ſuch action be brought jointly againſt the juſtice and him, upon producing the warrant, the jury ſhall find for him; and if they find againſt the juſtice, the plaintiff ſhall recover the coſts he is to pay to ſuch defendant againſt the juſtice, with a proviſo that if the judge certify that the injury was wilfully and maliciouſly committed, the plaintiff ſhall be entitled to double coſts. And a proviſo likewiſe, that ſuch action ſhall be commenced within ſix calendar months after the act committed.

Burr. 1766. &c.

The officer muſt prove that he acted in obedience to the warrant; and where the juſtice cannot be liable, the officer is not within the protection of the act.

Pickerſgill v. Palmer, Tr. 1 G. 3. C. B. Salk. 420. S. P.

If a man be impriſoned by a juſtice's warrant on the firſt day of *January*, and kept in priſon till the firſt day of *February*, he will be in time if he brings his action within ſix months after the firſt of *February*, for the whole impriſonment is one entire treſpaſs.

Lawrence and Cox, Hil. 33 G. 2. K. B.

The juſtice having pleaded tender of amends, the plaintiff obtained a rule for the defendant to bring the money into court for the plaintiff to take the ſame, upon diſcontinuing his action.

Nutting v. Jackſon, K. B. Eaſt. 13 G. 3.

An overſeer of the poor, who diſtrains for a poor's rate under a juſtice's warrant, is an officer within the protection of this act.

Feltham v. Terry, Eaſt. 13 G. 3. K. B.

Note, the above act extends only to actions of tort: and therefore where an action for money had and received was brought againſt an officer who had levied money on a conviction by a juſtice of the peace, the conviction having been quaſhed, it was holden that a demand of a copy of the warrant was not neceſſary.

CHAPTER V.

Of Injuries arising from Negligence or Folly.

EVERY man ought to take reasonable care that he does not injure his neighbour; therefore, where-ever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained.

As in the case mentioned in the third chapter, where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it.

If a man ride an unruly horse in any place much frequented, (such as *Lincoln's-Inn Fields*) to break and tame him; if the horse hurt another, he will be liable to an action; and it may be brought against the master as well as the servant, for it will be intended that he sent the servant to train the horse there; or it may be brought against the master alone. 2 Lev. 172. Michael v. Alestree & al'.

The servants of a carman run over a boy in the streets, and maimed him, by negligence; an action was brought against the master, and the plaintiff recovered. And note, that in such case the servant cannot be a witness for his master, without a release, because he is answerable to him. 1 Raym. 739. Str. 1083.

So in the case abovementioned, if one whip my horse, whereby he runs away with me and runs over a man, the man may bring an action against such person; for the whipping my horse was an act of folly, and therefore he ought to be answerable for the consequence of it. *A fortiori*, I might maintain an action if I received any hurt from my horse's running away, because the consequence is more natural. However it is proper in such cases to prove that the injury was such, as would probably follow from the act done: as that many people were assembled together near the place, at the time of his whipping the horse; or that the person run over was standing near and within sight; yet as the defendant is only to answer *civiliter* and not *criminaliter*, it does not seem absolutely necessary to give such 1 Mod. 24.

ſuch proof; though to be ſure ſuch circumſtances will have weight in diminiſhing or increaſing the *quantum* of the damages.

Carth. 194. 451. So if a man lay logs of wood croſs a highway; though a perſon may with care ride ſafely by, yet if by means thereof my horſe ſtumble and fling me, I may bring an action; for wherever a man ſuffers a particular injury by a nuſance, he may maintain an action; but then the injury muſt be direct (ſuch as before mentioned) and not conſequential, as by being delayed in a journey of importance.

3 Danv. 177. So if a ſurgeon undertake to cure a perſon, and by his negligence and unſkilfulneſs miſcarry, an action wi lie; but if the perſon undertaking to make the cure be not a common ſurgeon, there muſt be an expreſs promiſe; becauſe if it were not his profeſſion, it was the folly of the plaintiff to truſt him, unleſs he were deceived by an expreſs promiſe; and the law in ſuch caſe will not raiſe a promiſe. The defendant may in either caſe give in evidence that the plaintiff did not follow his directions, *&c.*

As I ſhall have occaſion to ſay more upon this head in the next book, under the title of "Caſe for Miſbehaviour in an Office, Truſt or Duty," and of "Caſe of conſequential Damages," I will only add in this place, That it is a ſettled diſ- 2 Raym. 1402. tinction, that where the immediate act itſelf occaſions a prejudice, or is an injury to the plaintiff's perſon, houſe, land, *&c.* treſpaſs *vi et armis* will lie: But where the act itſelf is not an injury, but a conſequence from that act is prejudicial to the plaintiff's perſon, houſe, land, *&c.* treſpaſs *vi et armis* will not lie, but the proper remedy is an action on the caſe.

CHAPTER VI.

Of Adultery.

I Am now come to the laſt thing for which (as a perſonal injury) an action will lie, and that is adultery. And the action lies in this caſe for the injury done to the huſband in alienating his wife's affections; deſtroying the comfort he had from her company; and raiſing children for him to ſupport and provide for. And as the injury is great, ſo the damages given are commonly very conſiderable: But they are properly increaſed or diminiſhed

diminiſhed by the particular circumſtances of each caſe; the rank and quality of the plaintiff; the condition of the defendant; his being a friend, relation or dependant of the plaintiff, or being a man of ſubſtance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant; and her having always borne a good character till then; and proof of a ſettlement, or proviſion for the children of the marriage, are all proper circumſtances of aggravation. On the other hand, proof that the wife had before eloped with others, or that the huſband had turned her out of doors, and refuſed to maintain her; and that he kept company with other women; or that he was acquainted with and conſented to the defendant's familiarity with her, is proper in mitigation of damages. So the defendant may give in evidence, that the wife had a baſtard before marriage, but he will not be permitted to give evidence of the general reputation of her being (or having been) a proſtitute; for that may be occaſioned by her familiarity with the defendant; though perhaps, after having laid a foundation by proving her being acquainted with other men; ſuch general evidence may be admitted: But for this matter of giving character in evidence, *vide poſt. lib. 6.*

Cibber and Sloper, per Lee Ch. J. Roberts v. Marlſton, at Hereford, 1756. per Willes Ch. J. Rigby and Stephenſon, Stafford, 1745. per Foſter J.

But in an action for *crim. con.* with the plaintiff's wife, lord *Mansfield* laid it down as clear law, that if a woman be ſuffered to live as a proſtitute, with the privity of her huſband, and a man is thereby drawn into *crim. con.* and the huſband brings an action, it will not lie: It is a damage without an injury. If it be not with the huſband's privity, it will not go to the action, let her be ever ſo profligate, but only to the damages. *Pratt* Ch. J. of *C. B.* declared himſelf of the ſame opinion in a like caſe much about the ſame time. However, in the caſe of *Cibber* and *Sloper, ſupra,* it was holden that the action lay, though the privity and conſent of the huſband to the defendant's connection with her, were clearly proved.

Smith v. Alliſon, Sittings at Weſtminſter B. R. cor. lord Mansfield after Tr. 5 Geo. 3.

Note, In this action it is neceſſary for the plaintiff to prove a marriage in fact; which may be done either by a copy of the regiſter, or by the teſtimony of one who was preſent at the ceremony. But

It is not neceſſary to call one of the ſubſcribing witneſſes to the regiſter to prove the identity of the perſons married, for a copy of the regiſter is ſufficient evidence of the marriage in fact between perſons of the deſcription there mentioned: and any evidence which ſatisfies a jury as to the identity of the

Birt v. Barlow Mich. 1779. K. B.

the plaintiff and his wife being the perſons married is ſufficient; as if the hand-writing of the huſband and wife to the regiſter is proved; or bell-ringers came to the parties and ſaid they rung for the wedding, and were paid by them, or people dined at the wedding dinner; or other circumſtances to aſcertain the perſons.

Morris v. Miller, K. B. Eaſt, 7 G. 3.

Where the plaintiff proved articles between himſelf and his wife, purporting to be made after the marriage, of the wife's eſtate, and which were executed by the plaintiff and his wife, with the privity of her relations, and her uncle was the truſtee in the ſettlement; that ſhe always went by the name of his wife, and was ſo conſidered by the relations on both ſides; and likewiſe proved cohabitation, this was holden not to be ſufficient.

Ibid.

So where the defendant was ſurpriſed at a lodging with the plaintiff's wife, and on being aſked where major *Morris*'s wife was, he anſwered "in the next room;" this was holden not to be ſufficient, for it is only a confeſſion of the reputation, and that ſhe went by the name of the defendant's wife, and not a confeſſion of the fact of the marriage.

Woolſton and Scott per Deniſon J. at Thetford, 1753, where plaintiff was an Anabaptiſt, and recovered 500*l*.

It has been doubted whether the ceremony muſt not be performed according to the rites of the church; but as this is an action againſt a wrong-doer, and not a claim of right, it ſeems ſufficient to prove the marriage according to any form of religion, as in the caſe of Anabaptiſts, Quakers or Jews.

Baker and Morley, Guildhall, 1739.

The confeſſion of the wife will be no evidence againſt the defendant; but a diſcourſe between her and the defendant may be proved. So letters written to her by the defendant may be read as evidence againſt him, but her letters to him will be no evidence for him.

Cook and Sayer, Mich. 32 G. 2. K. B. Burr. 753.

As the giſt of the action is the criminal converſation, and not the aſſault, the proper plea under the ſtatute of limitation is not guilty within *ſix* years.

BOOK II.

For what Injuries affecting a Man's personal Property, an Action may be brought.

INTRODUCTION.

HAVING in the last book taken notice of the several injuries affecting a man's person for which an action may be brought, I shall now consider in what case an action will lie for injuries affecting his property; and they divide themselves into two sorts:

1. Such as affect his personal property.
2. Such as affect his real property.

The actions that may be brought for injuries affecting his personal property, are,

1. Deceit.
2. Trover.
3. Detinue.
4. Replevin.
5. Rescous.
6. Trespass.
7. Case for Misbehaviour in an office, Trust or Duty.
8. Case for consequential Damages.

CHAPTER I.

Of Deceit.

2 Danv. 543. 4, 5.

DECEIT properly lies where one man does any thing in the name of another, by which the other is damaged and deceived; as if one without my knowledge purchase a *quare impedit* in my name, returnable *in Banco*, and after cause it to be abated, or me to be nonsuited. So if one forge a statute merchant in my name, and thereupon a *capias* is sued out, upon which I am taken, I may have a writ of deceit against him that forged it, and him that sued the *capias*. But this writ lies chiefly upon recoveries obtained by covin and deceit: And in such cases where the recovery is of land, it is brought to restore the party to the lands and profits: And in other cases, such as debt, &c. to give him damages: But what I intend to take notice of in the present chapter, are actions upon the case in the nature of a writ of deceit, which lie wherever a person has by a false affirmation, or otherwise, imposed upon another to his damage, who has placed a reasonable confidence in him; and if a man in possession of a horse, or a lottery ticket, sell it to another for his own; for possession of a personal chattel is a colour of title; and therefore it was but a reasonable confidence, which the buyer placed in him, when he affirmed it to be his own. But it is incumbent on the plaintiff in such case to prove the defendant knew it not to be his own at the time of the sale (for the declaration must be, that he did it fraudulently, or knowing it not to be his own:) For if the defendant had a reasonable ground to believe it to be his property (as if he bought it *bona fide*) no action will lie against him; but the defendant cannot plead such matter, but must give it in evidence.

Alyen 91. Medina and Stoughton, Salk. 210. 1 Raym. 593. S. C. Aleyn 91. Salk. 210.

1 Danv. 176. pl. 7.

So if the vendor affirm that the goods are the goods of a stranger, his friend, and that he had an authority from him to sell them, whereas in truth they are the goods of another, and he had no such authority, an action will lie against him; and in such case it will be sufficient for the buyer to prove them the goods of another, without proving that the defendant knew them to be so; (for it need not be averred in the declaration)

for

for the deceit is in his falsely affirming he had an authority to sell them; the plaintiff must therefore prove that he had no such authority; and doubtless, proving them to be the goods of another would be evidence *prima facie* that he had no authority, and sufficient to put him upon proving that he had.

If the seller were out of possession of the personal chattel at the time of the sale, no action will lie against him though it be not his own, without an express warranty, for then there was room to question his title. Salk. 210.

If the seller affirm the rent of a house to be more than it really is, whereby the purchaser is induced to give more than it is worth, an action will lie for the deceit; for the value of the rent is matter which lies in the private knowledge of the landlord and tenant, and must be the same to all. But if the seller had only affirmed, that *J. S.* would have given so much for it, whereas *J. S.* had never offered so to do, no action would lie, for such affirmation could not deceive in the value; so if he had only affirmed it was worth so much, for the purchaser might inform himself of the value. And so it is in all cases, where the purchaser may easily discover the true value, or where the thing may be of more value to one man than to another; as jewels, pictures, &c. Risney and Selby, Salk. 211. Raym. 1118. Sid. 146. Yelv. 20. 1 Sid. 146.

In *Chandler* v. *Lopus*, which was case, whereas the defendant having skill in jewels, had a stone which he affirmed to be a bezar stone, and sold it as such to the plaintiff: judgment was arrested, because the declaration did not aver, that the defendant knew it not to be a bezar stone, or that he warranted it to be one. Cr. J. 4.

But if a merchant sell one kind of silk for another, whereby the purchaser is imposed upon in the value, he may bring his action; and though it appear upon evidence that there was no actual deceit in the merchant, but that it was in the factor beyond sea; yet it will be sufficient to charge the defendant; for he shall be answerable for the deceit of his factor *civiliter*, though not *criminaliter*; for since somebody must be a loser, it is more reasonable that he that puts the trust and confidence in the deceiver should be the loser, than the stranger. Horn and Nichols, Salk. 289.

If the vendor affirm a horse to be sound wind and limb, whereupon the purchaser *fidem adhibens* gives so much; if the horse be blind, an action will lie; but it seems to be good evidence Butterfield and Burroughs, Salk. 21.

dence in such case on the part of the defendant, that the defect is visible, for then it cannot be reasonably intended that the affirmation extended to it. And note, that if the first contract with warranty be broken off, the warranty will not extend to a subsequent sale.

Skinn. 119. It has been said, that if a married man pretend to be single, and marry *J. S.* she may bring an action to recover damages

1 Lev. 247. for the injury done her by his deceit; but such an action will not lie for a man who is imposed upon by a married woman, because the conversation and contract of the wife will not

Proctor and Bury, Hil. 17 Geo. 2. C.B. bind the husband. And it may be doubted in the other case, being felony by 1 *Jac.* as it is a general rule, that where a trespass is by statute turned into felony, the trespass is merged; though in the case of *Garford* v. *Richardson*, *Tr.* 36 *Car.* 2. the court of K. B. upon a motion in arrest of judgment in such an action brought by a woman, gave judgment for the plaintiff, holding the action to be maintainable.

CHAPTER II.

Of Trover.

TROVER is a special action on the case, which one man may have against another, who hath in his possession any of his goods by delivery, finding or otherwise, or sells or makes use of them without his consent, or refuses to deliver them on demand; and it is for recovery of damages to the value of the goods; and therefore the declaration ought to contain convenient certainty in the description of the things,

Salk. 654. so that the jury may know what is meant thereby; but it need not contain so much certainty as an action of detinue, because that is for the recovery of the things themselves, and therefore trover for 20 ounces of cloves and mace has been

Str. 827. holden good. So for a parcel of diamonds.

Hartop and Hoare, E. 16 G. 2. K. B. If a gentleman lodge jewels sealed up in a bag with a banker for safe custody only, and the banker break open the bag, and pawn

pawn the jewels to another, the gentleman may bring trover againſt the pawnee, for he ſhall not be anſwerable for the deceit of the banker, as he gave him no power to do that act in which the deceit lies; and therefore it differs greatly from the caſe, taken notice of in the laſt chapter, of the merchant anſwering for the deceit of the factor.

The converſion is the giſt of the action, and the manner in which the goods came to the hands of the defendant is only inducement: and therefore the plaintiff may declare upon a *devenerunt ad manus* generally, or ſpecially *per inventionem*, (though the defendant came to the goods by delivery,) or that the defendant fraudulently at cards won money of the plaintiff from the wife of the plaintiff; and this being but inducement, need not be proved; but it is ſufficient to prove property in himſelf, poſſeſſion to have been in the defendant, and a converſion by him. 1 Danv. 23.

In the declaration the converſion was laid to be on a day before the trover; wherefore a motion was made in arreſt of judgment, but the declaration was holden to be good, for the *Poſtea convertit* is ſufficient, and the *viz.* is void. Cr. J. 428.

As to the property, a ſpecial one is ſufficient, and therefore this action may be brought by a carrier or bailee; or by a finder, for that will enable him to keep the thing againſt all but the rightful owner. 1 Mod. 31. Str. 505.

A ſheriff who has taken goods in execution may bring trover for them, if they were taken away before the ſale. 2 Saund. 47.

If an houſe be blown down and a ſtranger take away the timber, the leſſee for life may bring trover; for he has a ſpecial property to make uſe of the ſame (as if he would rebuild) though the general property be in the reverſioner. Per Powel J. on Midland Circuit, Salk. MSS.

A lord who ſeizes an eſtray or wreck, may before the year and day expired maintain trover againſt a ſtranger; for he has more than a poſſeſſion, *viz.* a poſſeſſion that will turn into a property. Sir William Courtney's Caſe, C. B. Salk. MSS. Pye and Pleydel, Berks, 1750. per Clarke Bar. S. P.

And property is ſufficient without poſſeſſion; therefore on the trial of an ejectment for a mine it was holden, that a recovery in trover for a parcel of lead dug out of the mine was no evidence of the plaintiff's poſſeſſion. Lord Cullen's Caſe at Bar, K. B.

Culling and Tuffnal, per Treby Ch. J. at Hereford 1694.

In trover for ten load of timber, the caſe was, that the defendant had been tenant to the plaintiff, and erected a barn upon the premiſſes, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was uſual in that country to erect barns ſo, in order to carry them away at the end of the term, a verdict was given for the defendant. But though Lord Chief Juſtice *Treby* thought proper in this caſe, to take advantage of the cuſtom of the country, yet I apprehend that it would now be determined in favour of the tenant without any difficulty; for of late years many things are allowed to be removed by tenants, which would not have been permitted formerly; as marble chimnies, *&c.* ſo more ſtrongly in things relative to trade, as brewing veſſels, coppers, fire engines, cyder mills, *&c.* The general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; but many exceptions have been admitted of late to this general rule, as between landlord and tenant, or between tenant for life, or tail, and the reverſioner: but the rule ſtill holds as between heir and executor.

Lord Dudley and Lord Ward, Mich. 1751. in Canc.

2 Stra. 1141.

In trover by an executor againſt an heir, *Lee* C. J. held that hangings, tapeſtry, and iron backs to chimnies belonged to the executor, and he recovered accordingly.

Winch. 51. Cox v. Godſalve, Holt's MS. 157.

But corn growing belongs to a deviſee of land and not to the executor. Though a deviſee of goods, ſtock, and moveables ſhall take it from both.

2 Lev. 107.

If there be trover before the marriage of the plaintiff, and a converſion after, the baron and feme may join; for though the converſion is the cauſe of action, and therefore the huſband may ſue alone, yet the inception of the cauſe of action was in the wife by the trover.

Salk. 126.

If a bank bill, payable to *A.* or bearer, be found by a ſtranger, who transfers it to *B. A.* may maintain trover againſt the ſtranger, but not againſt *B.* becauſe the courſe of trade creates a property in him: but as to the ſtranger who had no title, the property is ſtill conſidered to remain in *A.* But if the plaintiff had given lottery tickets to a goldſmith to receive money for them, and the goldſmith having likewiſe received tickets of the defendant, and given him a note to pay him ſo many tickets, afterwards had delivered upon his note the plaintiff's tickets to the defendant, this would not change the property.

Salk. 284.

Salk. 290.

One jointenant or tenant in common, or parcener, cannot bring trover againſt his companion for a thing ſtill in his poſſeſſion, becauſe the poſſeſſion of one is the poſſeſſion of both; if he do, it is good evidence upon not guilty. But if one tenant in common deſtroy the thing in common, the other may bring trover; and therefore where one tenant in common of

Co. L. 200. Barnardiſtone v. Chapman and Smith, H. 2 G.

of a ship took it away, and sent it to the *West-Indies*, where it was lost in a storm, Lord *King* left it to the jury, whether this were not a destruction by the defendant; who found it so accordingly. But if one jointenant, *&c.* bring trover against a stranger, the defendant may plead it in abatement, but cannot give it in evidence. But in such case the plaintiff shall recover only the value of his share. Salk. 290. post. 90. 2 Lev. 113.

If a lease be made to *A.* and *B.* and the indenture of lease be delivered to *B.* who dies, by which the whole survives to *A.* he may bring trover for the indenture, for the possession of *B.* was his possession. 2 Leon. 220.

But though one tenant in common cannot bring trover against his companion, yet that is only where the law considers the possession of one to be the possession of both; and therefore if *A.* be tenant in fee of one fourth part of an estate, and *B.* tenant in common with him of the other three parts, for a term of years without impeachment of waste; if *A.* cut down any trees and *B.* take them away, *A.* may maintain trover: for though *B.* being dispunishable of waste might cut down what trees he would, yet trees having an inheritable property, and he having no interest in the inheritance, cannot take them when felled by him who has the inheritance; and consequently his possession being tortious, cannot be said to be the possession of the other. Apud Exon. per Turton J. Salk. MSS. West and Passmore. Oct. Str. 4. S. C.

If a son, having a general authority to receive and pay money for his father, receive money due on a bill to his father, and give a receipt for it, as money had to his father's use, and after give it away, the father may bring trover against the donee; for his son's receipt is a good discharge of the debt, and therefore his possession is the possession of the father; the son being as to this purpose his servant; and the son may in this case be a witness (to prove the delivery to the defendant) his evidence being corroborated by other circumstances. Salk. 289.

If *A.* be indebted to *C.* and *B.* to *A.* and it is agreed between them, that *B.* shall deliver goods to *C.* in satisfaction of *A*'s debt; if *B.* convert them to his own use, *C.* may maintain trover against him though he never had possession, for by the agreement the right was in him, and the conversion a wrong to him: but if *A.* order a tradesman to send him goods by a hoyman, and the tradesman send the goods by a porter to the house where the hoyman resides when in town, 1 Bulst. 68. Colston v. Woolston, Tr. 1 An. per Holt at G. Hall. Salk. MSS.

 and

and the porter not finding him, leave the goods with the landord, *A.* cannot have trover againſt the landlord, for the property never veſted in him, but remained in the tradeſman; but if the perſon to whom the goods had been delivered had been a ſervant to the hoyman and intruſted by him to receive the goods, *A.* might maintain trover; for by ſuch delivery the property would have veſted in him; and therefore in ſuch caſe the tradeſman could not bring trover againſt the hoyman. But if *A.* had not directed the tradeſman to deliver the goods to that particular hoyman, in ſuch caſe the property would not have been in *A.* till he had actually received the goods; and therefore the tradeſman might bring trover for them againſt the hoyman. Yet it has been holden, that if a tradeſman in *London* ſend goods by order, to a tradeſman in the country, by a carrier not named or appointed by the country trader; if the carrier embezil the goods, the country trader muſt ſtand to the loſs. So if *A.* order the goods to be tranſmitted to him by a particular carrier, though upon condition to return them again if he diſlike them; yet upon delivery to the carrier the property is veſted in *A.* and he will be bound to pay the price to the tradeſman; and conſequently the tradeſman cannot bring trover againſt the carrier; though perhaps if it were to come out in evidence, that the carrier had kept the goods in town, in ſatisfaction of a debt due from *A.* to him (and that without the conſent of *A.* who was ſoon after to run off) the court would leave it to the jury, and not let the carrier take advantage of ſuch tortious act; for in ſuch caſe there is reaſon to preſume the carrier did not accept the goods for *A.* never having had any intention to deliver them to him; and if ſo, the property will not have veſted in *A.* and conſequently muſt remain in the tradeſman, who may therefore bring the action. The defendant 7th *Apr.* ſent goods to *A.* who in *May* following finding himſelf in bad circumſtances, re-delivered the goods to a friend of the defendant's, and ſent him notice; but before the defendant could ſignify his conſent to take back the goods, *A.* became a bankrupt, and in an action of trover by the aſſignee, the court held, there being a precedent conſideration, *viz.* the debt, *A.* could not countermand the delivery, but the property reveſted in the defendant till diſagreement, and the contract did not ſtand open till agreement.

2 M. 309. S. P. Salk. 18. S. P.

Graves and Child P. 2. Ann. per Holt Salk. MSS.

3 P. W. 186.

Haynes v. Wood, per Herbert. J. Surry 1686.

Atkins and Berwick, E. 5 G. 1 Str. 165.

But

But where a bankrupt on 7th *Nov.* indorſed and ſent a promiſſory note for 600*l.* by the poſt to the defendant, to whom he was indebted to a larger amount, and the letter was carried to the poſt office that morning; but by the courſe of the poſt it could not go away till the next day, and the defendant could not receive it till the 10th, at which time he did receive it; and an act of bankruptcy was committed on the 8th. and it was found by the jury that the note was indorſed and ſent in contemplation of an act of bankruptcy: the court held this to be a fraudulent preference of the defendant to the other creditors of the bankrupt; and that as the note was not found to have been indorſed in payment of any particular debt, and it might be in truſt for the bankrupt, and no aſſent was given by the defendant, before the act of bankruptcy was committed, the aſſignees were intitled to recover it from the defendant. But it was there ſaid, that if a man ſend bills of exchange, or conſign a cargo to another who has before paid the value for them, the ſending them to the carrier will be ſufficient to prevent the aſſignees from recovering the goods or bills back, in caſe of an intervening act of bankruptcy; though the perſon to whom they were ſent did not know of their being ſent at that time. Alderſon and Another aſſignees of Laroche and Another v. Temple K. B. Tr. 8 G. 3.

If a man deliver corn to his ſervant to ſell, who does ſo accordingly, and converts the money to his own uſe, the maſter may bring trover againſt him for the money; for though it has formerly been a doubt, yet it ſeems now to be agreed, that trover will lie for money, becauſe damages only are to be recovered. Noy 12. Cr. E. 746. 1 R. A. 5. Salk. 289. Str. 142.

In trover for a debenture, the plaintiff muſt exactly prove the number of the debenture as laid in the declaration, and the exact ſum to a farthing or he will be nonſuited. But he need not ſet out the number (any more than the date of a bond, for which trover is brought,) for being out of poſſeſſion he may not know the number, and if he ſhould miſtake, it would be a failure of his ſuit. Per Holt at G. Hall, 1707. Cr. Cas. 262.

In order to prove property, where the action is brought by an aſſignee under a commiſſion of bankruptcy (who may declare, if he will, *ut de bonis ſuis propriis*) it is neceſſary to prove, 1. The bankrupt a trader within the ſtatute. 2. The act of bankruptcy. 3. That the commiſſion was regularly granted. 4. The aſſignment to the plaintiff. 5. A property in the bankrupt. It will be proper therefore to conſider what evidence is ſufficient to prove theſe ſeveral things; and for that purpoſe I will ſet down the words of the ſeveral ſtatutes which deſcribe what perſons may be bankrupts, and what acts will make them ſo. Carth. 453. Ruſh and Barker, Mich. 8 G. 2.

By 13 *El. c.* 7. Any perſon uſing the trade of merchandize, by way of bargaining, exchange, rechange, bartry, chevifance,

 or

or otherwiſe, in groſs or by retail, or ſeeking his trade or living by buying and ſelling, that departs the realm, or begins to keep houſe, or otherwiſe abſent himſelf, or ſuffers himſelf willingly to be arreſted for any debt not due, or ſuffers himſelf to be outlawed, to defraud any of his creditors, ſhall be deemed a bankrupt; and by 1 *Jac. c.* 15. or fraudulently procures his goods to be attached or ſecreted, or makes any fraudulent grant of his land or goods, to the intent that his creditors may be defrauded; and by 21 *Jac.* 1. *c.* 19. any that uſes the trade of a ſcrivener receiving other men's money into his truſt and cuſtody, or any merchant who ſhall endeavour to compel his creditors to take leſs than their juſt debt, or gain longer time than was given upon the original contract, or being indebted in 100 *l.* or more, ſhall not pay or compound for the ſame within ſix months after due, and the debtor be arreſted for the ſame, or within ſix months after an original ſued out and notice thereof, or being arreſted ſhall lie in priſon two months or more upon that or any other arreſt, or being arreſted for 100 *l.* or more of juſt debts ſhall eſcape out of priſon, or procure his enlargement by putting in hired bail. And by the ſaid act 21 *Jac.* 1. in the caſes of arreſt and lying in priſon, or getting forth by hired bail, he is to be deemed a bankrupt from the time of his firſt arreſt.

By 14 *Car.* 2. *c.* 24. The having money in the *Eaſt India* Company will not make a trader; and in the 5 *G.* 2. *c.* 30. by which bankers, brokers, and factors, are made liable to be bankrupts, there is a proviſo that it ſhall not extend to any farmer, grazier or drover.

Vide Vernon and others v. Hankey and others G. Hall, 16th July, 1787.

By 5 *G.* 2. *c.* 30. *ſ.* 24. If any bankrupt ſhall after the iſſuing of a commiſſion againſt him pay the perſon who ſued out the ſame, his debt, or give or deliver to ſuch perſon goods or any other ſatisfaction or ſecurity for his debt, whereby the perſon ſuing out the commiſſion ſhall privately receive more in reſpect of his debt than the other creditors, ſuch payment, *&c.* ſhall be ſuch an act of bankruptcy whereby, on good proof thereof, ſuch commiſſion ſhall be ſuperſeded, and another commiſſion ſhall be awarded to any creditor petitioning, and the perſon taking or receiving ſuch goods or other ſatisfaction ſhall loſe his debt and all that he has received.

Conſtructions on the aforeſaid Statutes.

Ca. K. B. 243.

A man cannot be a bankrupt in reſpect to debts contracted during his infancy, though the act of bankruptcy were committed after he was of age.

Tribe and Webber, H. 17 G. 2. C. B. Salk. 109. S. P.

A. being arreſted, puts in bail, afterwards he ſurrenders in diſcharge of his bail, and is above two months in priſon; he is

is a bankrupt only from the time of his surrender, not from the time of his arrest.

But where sham bail is put in before a judge, as a means to get the defendant turned over to the prison of the court, and he is accordingly immediately surrendered and sent there, the imprisonment is to be computed from the arrest. Rose v. Green, Hil. 31 G. 2. B. R.

A shoemaker may be a bankrupt, for he lives by buying and selling leather; but an innkeeper as such cannot, for though he buy provision, yet he does not properly sell it, for the attendance of his servants, furniture of his house, *&c.* are to be considered. Cro. Car. 31. 3 Lev. 309.

So it has been holden that a victualler, as such, cannot be a bankrupt. Saunderson v. Roles K. B. East. 7 G. 3.

One who buys cattle at one fair, keeps them three or four days on his own ground, and then drives them to another fair to sell, is a drover within the meaning of 5 *G.* 2. aforesaid. Mills and Hughes, M. 19 Geo. 2. C. B.

In the case of *Woodier*, a mercer on *Ludgate-hill*, against whom his going beyond sea being given in evidence, it was insisted that shewing *quo animo* it was done, (*viz.* on account of having killed his wife) it could not be construed an act of bankruptcy; but it appearing his creditors were thereby in fact prevented from recovering their debts, *Reeves* Ch. Just. held it was: but if that fact had not come out, it would have been otherwise. Cited by Sir J. Strange in Degolls and Ward, Hil. 12 G. 2.

If *A.* commit a plain act of bankruptcy, as keeping house, *&c.* though he after go abroad and be a great dealer, yet that will not purge it. But if the act were doubtful, the going abroad and dealing will be an evidence to explain the intent of the first act; for if it were not to defraud creditors, and keep out of the way, it will not be an act of bankruptcy. Also if after a plain act he pay off or compound with all his creditors, he is become a new man. Salk. 110.

To constitute an act of bankruptcy, the denial of the party must be with an intent to delay creditors; therefore being denied when sick in bed, or engaged in company, will be no act of bankruptcy; and *Lee* Ch. Just. held the same, where the denial was by agreement in order to take out a commission. But in *Bramley* v. *Mundee* at *Guildhall* 2d *June* 1756, Mr. Justice *Foster* held it sufficient proof of an act of bankruptcy: the fact proved was, that the party (in consequence of an agreement made at a meeting of the creditors two hours before, at which he and the plaintiff both were) was denied to the plaintiff's clerk, who was sent to demand money; Field and Bellamy, H. 15 G. 2

tamen quære, for how can ſuch a denial be ſaid to be with intent to delay the creditor?—Probably the defendant himſelf in this caſe had concerted or been privy to the committing the act of bankruptcy: and under ſuch circumſtances a denial by agreement has in many caſes been holden to be ſufficient proof of an act of bankruptcy. For where a perſon has been aſſiſting in procuring ſuch act of bankruptcy to be committed, it does not afterwards lie in *his* mouth nor ſhall *he* be permitted to ſay it was fraudulent or ineffectual. But ſuch act of bankruptcy will be of no avail againſt perſons who were not privy to it.—Though a man with intent to delay his creditors order himſelf to be denied, yet unleſs in fact he be denied to a creditor, it will be no act of bankruptcy; therefore it is neceſſary to prove that the perſon denied was a creditor.

Jackmar v. Nightingale, P. 13 G. 2. per Lee at G. Hall.

On the 28th of *November*, *Hall* rode out of town, and returned in the evening, before which a bailiff had been at his ſhop to arreſt him: the next morning he ſent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly; and this was held to be an act of bankruptcy within 1 *Jac.* 1. *c.* 15.

Meylin & al. v. Eyles. 2 Str. 809.

In an action of trover againſt a ſheriff, who had levied an execution on the bankrupt's goods, to prove an act of bankruptcy prior to the execution, the plaintiffs relied on an aſſignment made by the bankrupt of *all* his effects to two of his creditors, in truſt for themſelves, and the reſt, in conſequence of a propoſition made by the bankrupt at a meeting of his creditors, and accepted by all that were preſent. *Per Lord Mansfield*, this deed is a fraud on the bankrupt laws, and is an act of bankruptcy, unleſs every creditor concurred. And as every creditor did not concur in it, (for the plaintiff in the execution was adverſe) the preſent plaintiff had a verdict.

Kettle and others, aſſignees of Ewing v. Hammond, Weſtminſter Sittings after Hil. 7 G. 3.

A man cannot be an evidence to prove an act of bankruptcy committed by himſelf; but his confeſſion to a third perſon that he had gone out of the way to avoid being arreſted, is evidence. So a verdict upon an iſſue directed out of chancery, to which only one of the defendants was party, may be read againſt all the defendants, to prove the time of the act of bankruptcy.

Ewens and Gold, H. 8 G. 2. per Hardwicke Ch. J.

Lowfield and Bencroft, per Raym. Ch. J. G. Hall. 1732.

A man's giving money for notice when a writ ſhould come into the ſheriff's office againſt him is no proof of an act of bankruptcy, for he may do it to prevent his credit being blown.

Croxton and Hodges, per Forteſcue J. Hereford, 4 G. 2.

Proof

Proof of the commission ought to be by shewing it under seal, and the petition to the chancellor on which it was granted, and the debt of the petitioning creditors, which (by 5 *G.* 2.) if one, must amount to 100*l.* if two, to 150*l.* if three or more, to 200*l.* It must also be a legal debt; therefore the assignee of a bond cannot be a petitioning creditor (*Medlicott*'s case in chancery, *E.* 4 *G.* 2. *Oct. St.* 161.) and it must be due at the time of the act of bankruptcy committed, (*Toms* and others *v. Mytton H.* 13 *G.* 1. *Oct. Str.* 147.) but though of above six years standing, it will be good. Swayne & al. v. Wallenger, H. 13 G. 1. Stra. 746. Crisp and Perrit, E. 17 G. C. B.

N. B. A joint creditor may sue out a separate commission.

The assignment is to be proved by producing the deed, and proving the execution of it by the commissioners.

Till assignment the property is not out of the bankrupt; but the assignment vests the property in the assignees from the time of bankruptcy; and therefore if a person sue out execution against a bankrupt, and the sheriff seize his goods, and sell them, and give the money to the person suing out the execution, the assignees may bring trover against the sheriff (or the person suing out the execution, if he can be proved a party to the conversion, by giving bond to secure the sheriff, and so making it his own act;) and there is no occasion for an actual demand, because the property being vested in the assignees from the time of the bankruptcy, the execution was tortious. If therefore a sheriff levy goods on a *fi. fa.* after an act of bankruptcy committed, but before a commission sued out, he ought not to sell the goods after the commission, for if he do, he will make himself liable in trover. Where the case appeared to be, that the defendant took the goods by virtue of a *fi. fa.* directed to him as bailiff after an act of bankruptcy, but before a commission sued out; on a special verdict he had judgment, for being an officer he was obliged to execute the writ. Note, the single question referred by the special verdict was, whether the taking were lawful? and it was upon that the court determined: A bailiff, as soon as he has taken the goods, is *functus officio*, and therefore if he were justified at the time of taking, a subsequent commission ought not to affect him. Salk. 108. Rush and Baker M. 8 G. 2. K. B. Ibid. Cowper and Chitty & al. E. 32 G. 2. K. B. Bailey and Bunning, 1 Lev. 174.

A. was arrested and lay in gaol for two months, in which time his goods were taken in execution on a *fi. fa.* then a commission of bankruptcy issued, and *A.* was declared a bankrupt from the first arrest. Afterwards the sheriff returned *nulla bona*; Coppingdale v. Brigden & al. B. R. Tr. 32 & 33 G. 2.

bona; this is a good return.—The *fi. fa.* was returnable the 26th *June*: the commission issued the 5th *July*: The return was in fact made the 5th *November*, and the court said they would take it as made at the time when in fact it was made, and not as made at the day of the return of the writ.

Garrat v. Cullum, East. 1709. *A.* living in *Ireland*, employed *B.* in *London* to sell goods for him. *B.* sold them to *J. S.* (*A.* not knowing to whom they were sold, and *J. S.* not knowing whose property they were) *B.* became a bankrupt, and *J. S.* paid the money to his assignees. *A.* shall recover it from them. It was agreed that a payment by *J. S.* to *B.* was a discharge for him against the principal *A.* yet the debt was not in law to *B.* but to the person whose goods were sold, and therefore was not assigned to the defendants under the general assignment of all their debts, but remained due to *A.* as it was before; and it being paid to the defendant, who had no right to it, but under a mistake, that payment must be understood in law to be for the use of him to whom it was due.

Cr. Car. 148. *A.* became a bankrupt after his goods extended on a statute, and before the *liberate*; and in trover by the assignees against the defendant, who had got possession by virtue of the *liberate*, the court held the property was divested out of the bankrupt by the extent, and consequently that the goods were not assignable.

Str. 982. And note. The act of bankruptcy is the same thing in the case of common creditors, as the assignment is in the case of the king. The king is bound by an actual assignment, because the property is then absolutely transferred to a third person: but relations, which are but fictions of law, cannot bind the crown.

And note, that the 19th *G.* 2. reciting that persons frequently commit secret acts of bankruptcy unknown to their creditors, and after appear publicly and carry on their trade, and that permitting such secret acts of bankruptcy to avoid payments *bona fide* made is a discouragement to trade, enacts that no person who is *bona fide* a creditor of any bankrupt for goods sold, or for any bill of exchange drawn, negotiated or accepted by him, shall be liable to refund to the assignees any money, which before the suing forth the commission was *bona fide*, in the usual or ordinary course of trade and dealing, received by such person of such bankrupt before such time as he shall have notice that he is become a bankrupt, or that he is in insolvent circumstances.

As to the proof of property; by 21 *Jac.* 1. *c.* 19. if any person becoming a bankrupt have in his possession, by the consent of the owner, goods of another man, and shall be reputed owner of such goods, and shall take upon him the sale, alteration or disposal of them, the commissioners of bankrupts shall have power to sell such goods for the benefit of creditors.

L'Apostre v. Lepraistrier, M. 1708. 1 P. W. 318. This does not extend to goods which a factor has in his possession and offers to sell for another man: therefore in trover for

for a parcel of diamonds againſt the aſſignee of *Levi* a bankrupt, to whom before his bankruptcy the plaintiff had delivered the diamonds to ſell; upon a caſe made, the court of *K. B.* were of opinion that the general words of the clauſe ought to be explained by the preamble, and that theſe jewels being originally the plaintiff's, and the bankrupt having no more than a bare authority to ſell them for the plaintiff's uſe, were not liable to the bankruptcy.

But if a jeweller have in his poſſeſſion jewels belonging to *A.* and becoming a bankrupt offer the jewels to ſale to *J. S.* the aſſignee may diſpoſe of them, and *A.* cannot have trover againſt the vendee. Salk. MSS. S. C.

Upon this clauſe too in the ſtatute it has been determined, that if a trader mortgage his ſtock in trade, and continue in poſſeſſion and become a bankrupt, his aſſignees may diſpoſe of it; but if he mortgage or ſell a choſe in action (*ex. gr.* a ſhip at ſea) and deliver over the muniments, it will not be within the ſtatute.—If goods be conſigned to a factor who ſells them, and becomes a bankrupt, the merchant muſt come in under the commiſſion; but if he lay the money out in other goods for the merchant, the merchant will have the goods. So if he ſell the goods for money at a future day, the merchant will be entitled to the money. Royal and Rowles, H. 22 G. 2. in Canc. Scott v. Salmon, C. B. 16 G. 2.

And by the 1 *Jac.* 1. *c.* 15. *ſ.* 5. If any perſon who ſhall afterwards become a bankrupt, ſhall convey his lands or chattels, or transfer his debts, except upon the marriage of any of his children, or ſome valuable conſideration, the commiſſioners may diſpoſe thereof the ſame as if the bankrupt had been actually ſeiſed or poſſeſſed.

The bankrupt cannot be evidence to ſwear property in himſelf, or a debt due to himſelf, without a releaſe of his ſhare in the ſurplus and the dividends, for elſe he is plainly intereſted, but he may prove property in, or a debt due to another. Ewens and Gold, per Hardwicke, 8 G. 2.

By 5 *G.* 2. *c.* 30. *ſ.* 7. In caſe any perſon is ſued for a debt due before he became a bankrupt, he may plead in general, that the cauſe of action did accrue before ſuch time as he became a bankrupt, and may give the ſpecial matter in evidence; and the certificate and allowance ſhall be ſufficient evidence of the trading, bankruptcy, commiſſion, and other matters precedent to ſuch certificate, and a verdict ſhall thereupon be given for the defendant, unleſs the plaintiff can prove the certificate obtained unfairly and by fraud, or can make appear any concealment by the bankrupt to the value of 10 *l.*

Though by that ſtatute the future effects of a bankrupt after ſecond bankruptcy, where he does not pay fifteen ſhillings in Str. 1207.

the pound, are liable to be ſeized for the benefit of creditors, yet till ſeizure the bankrupt has ſuch a property in them as will enable him to ſell them.

4 Inſt. 154. In trover by a ſtranger for goods taken at ſea, in order to eſtabliſh a property in himſelf, the plaintiff muſt prove two things, 1. That the ſovereign of the plaintiff was, at the time of the taking, in amity with the king of *England*. 2. That the defendant was, at the time of taking, in amity with the ſovereign of him whoſe goods were taken; for if he that took them were at enmity with him whoſe goods were taken, the taking was lawful, and of conſequence the property altered.— The caſe in fourth Inſtitute was, *England* was in amity with *Spain* and *Holland*, who were at enmity; the *Hollanders* took goods at ſea from the *Spaniards* and brought them into *England*, the *Spaniards* brought trover for them as being *in ſolo amici*; and it was holden that they could not recover.

Salk. 441. Poſſeſſion ought to be proved in the defendant himſelf, for delivery to a ſervant is not ſufficient, if the goods do not come to his hands; unleſs the ſervant be employed by his maſter to receive goods for him, and they be delivered in the way of his trade; as if a pawn be delivered to a pawnbroker's ſervant. Raym. 792.

To determine what evidence will be ſufficient to prove a converſion in the defendant, it muſt be known how the goods came to his hands; for if they came to his hands by delivery, finding, or bailment, an actual demand and refuſal ought to be proved; but it is not neceſſary to prove an actual demand, if an actual taking be proved, for the taking being unlawful is itſelf a converſion; ſo likewiſe if an actual converſion be proved, it is not neceſſary to prove a demand. 1 Sid. 264.

10 Co. 56. A demand and refuſal is only evidence of a converſion; and therefore, if the jury find a ſpecial verdict that there was a demand and refuſal, the court cannot adjudge it a converſion.

2 M. 245. A demand and refuſal is no evidence, where it is apparent the defendant has made no converſion; as ſuppoſe the defendant to have cut down the plaintiff's trees, and to have left them lying in the plaintiff's ground; for it is plain he has not converted them, if they continue there as before.

Salk. 655. In trover againſt a carrier, denial is no evidence of a converſion, if the thing appear to be really loſt through negligence; but if that do not appear, or if the carrier had it in his cuſtody

when

when he denied to deliver it, it is good evidence of a conversion. But he may give in evidence the detaining of the goods for carriage; so he may give in evidence that the goods were stolen; for then he is guilty of no conversion, though he will be liable in an action on the case on the custom. 2 Raym. 752. 1 Danv. 22.

So in trover for a horse in an innkeeper's hands, denial is no evidence of a conversion, unless the plaintiff tender what the horse has eaten out, and the jury is to judge if sufficient were tendered. But if *A.* put a horse to pasture with *B.* and agree to pay him 12 *d. per* week as long as he remains at pasture, and afterwards sell him to *C.* who brings trover against *B.* he cannot give in evidence the detaining him till he be paid, but is put to his action against *A.* for this differs from the case of an innkeeper or taylor, who may retain. 2 Show. 161. Cr. Car. 271.

A lord of a manor seized a beast as an estray, and kept it for some time after having proclaimed it. The owner afterwards, and within the year and day, claimed it, and brought trover without first tendering a satisfaction for the keeping of it: And for the want of that it was holden that the action would not lie. 2 Ro. Abr. 92.

But if a horse be distrained in order to compel an appearance in a hundred-court, after appearance the plaintiff cannot justify detaining the horse till paid for his keeping. Lenton and Cook, 9 G. 2.

So if *A.* purchase the interest of a lease for years, and the writings are left in the hands of *B.* an attorney, to draw an assignment, and he does draw one accordingly, which is executed, he cannot afterwards refuse to deliver it to *A.* till he have paid for it. 1 Raym. 738.

So where the defendant paid the duty at the custom-house for the plaintiff's goods; for he may have an action for the money so laid out. Str. 651.

Note, no person can in any case retain where there is a special agreement, because then the other party is personally liable. Bremin and Currant, Tr. 28 G. 2.

If trover be brought against a constable for goods taken by him, pursuant to a warrant from a justice or other person, if he have a jurisdiction, though not in that particular instance, (as if commissioners of the window-tax fine a collector for a neglect not within their power) the constable will not be liable, for he is not guilty of a conversion to his own use; and though the plaintiff is intitled to the surplus of the distress, yet he cannot Presly and Dawkins, H. 11 W. 3. Oct. Str. 6.

recover

Raym. 740. tamen quære.

recover it in trover. So lord chief juſtice *Holt* held, that if a ſheriff upon an extent for the king againſt *A.* ſeize the goods of *B. B.* cannot have trover, becauſe, by the ſeizure, the property veſted in the king.

Tinkler v. Poole and another, B. R. Mich. 11 G. 3.

If upon an information of ſeizure the goods be condemned, no action will lie for them. But if there be no condemnation, and the goods were not liable to be ſeized, treſpaſs or trover will lie againſt the officer for them. But by 19 *G.* 2. *c.* 34. *ſ.* 16. if the judge certify on the record that there was a probable cauſe for ſuch ſeizure, then the plaintiff, beſide his ſhip or goods ſo ſeized, or the value thereof, ſhall not be intitled to above 2 *d.* damages, nor to any coſts of ſuit.

1 Danv. 21.

If a man take my horſe and ride him, and after deliver him to me, yet I may have this action againſt him, for the riding was a converſion, and the re-delivery will only go in mitigation of damages.

Str. 576.

Drawing out part of a veſſel, and filling it up with water, is a converſion of all the liquor.

2 Bulſ. 312. per Coke Ch. J.

If a man find my goods, and upon a demand anſwer that he knows not whether I am the true owner, and therefore refuſe; this is no evidence of a converſion, if he keep them for the true owner.

Cr. E. 78. Cr. Car. 262.

Though it be neceſſary to alledge a day and place of converſion (or a requeſt and refuſal, which is tantamount) yet as it is a tranſitory action, the converſion may be laid here and proved in *Ireland.*

Cr. J. 661.

If trover be brought againſt baron and feme, the declaration muſt ſuppoſe that they converted the goods to the uſe of the huſband, and it muſt not be laid that ſhe converted them to her own uſe; and many judgments have been arreſted on that account; yet as the converſion is a tort, it ſhould ſeem as if ſhe might be charged with it the ſame as with a treſpaſs: as ſuppoſe ſhe were to take my ſheep and eat them: and in treſpaſs againſt baron and feme it may be laid in the declaration, that they converted the goods to their own uſe; for though it had been to the uſe of the huſband only, yet after his death the wife would be charged with the damages; however there is a difference between the two caſes, for in trover the converſion is the gist of the action, but not in treſpaſs.

Yelv. 166.

Smalley and Kirtoot & Ux' E. 11 G. 2. Str. 1094. Pullen v. Palmer, M. 3 G 1. C. B.S. P. Andr. 245.

An executor left furniture in the house by the consent of the heir, who used them; afterward upon a demand and refusal the executor brought trover; the heir pleaded the statute of limitations, and *per cur.* the user before demand was no conversion, and the refusal (which is the only evidence of it) being within six years, the action is not barred. Far. 99. Wortley Montague v. Lord Sandwich.

Trover will not lie against a servant for taking goods by his master's command, and for his master's use; but trespass will.—This rule must not be taken in the full latitude of the words, for it is certain it will not extend to cases where the command is to do an apparent wrong; and so it is said by J. *Scroggs* in *Mires* and *Solebay*; and perhaps it will not to any case where the taking is tortious, for then there is no occasion for a demand and refusal; but where the possession was lawful, a refusal by a servant will not be evidence of a conversion in him, for it will be evidence of a conversion in his master; as is the case of the pawnbroker in *Salk.* 441. *Jones* and *Hart* *Parker* and *Godwin*, *M.* 2 *G.* 2. is a strong case to shew how far one man acting by the command of another shall be answerable in trover: that was, a bankrupt left plate with his wife, who delivered it to a servant to sell, the servant delivered it at the door of *Woodward*'s shop to the defendant, who went into the shop and pawned it, and immediately delivered the money to the servant, who paid it to the wife. Upon trover brought by the assignee against the defendant, he obtained a verdict; but, upon motion, the court granted a new trial, as being a conversion in the defendant; and upon a second trial the plaintiff had a verdict. Note; the defendant pawned it in his own name, and gave his own note for the money. Mires and Solebay, 2 Mod. 242. Str. 151. 813.

If the plaintiff prove the goods to have been in his possession, it is *primâ facie* evidence of property, but the defendant may prove them the goods of *J. S.* who died *intestate*, and that letters of administration have been granted to him; but such evidence will not be conclusive against the plaintiff, for he may shew that he was married to *J. S.* and so entitled. Blackham's case, Salk. 290.

So it would be sufficient if the defendant could prove that the plaintiff had before recovered in an action of trover against *J. S.* for the same goods, for such recovery vests the property in *J. S.* and the plaintiff has damages in lieu thereof, and therefore in a second action he cannot say the goods are his. Str. 1078.

Where

Carth. 104.

Where trover is brought by a rightful executor or adminiſtrator againſt an executor *de ſon tort*, he cannot plead payment of debts, *&c.* to the value, *&c.* or that he hath given the goods, *&c.* in ſatisfaction of debts, but, upon the general iſſue, ſuch payments ſhall he recouped in damages; and if they amount to the full value, the plaintiff ſhall be nonſuited: but he ſhall not give in evidence a retainer for a debt of his own; and if the action be treſpaſs inſtead of trover, payment of debts to the value will only go in mitigation of damages: And perhaps in trover by a rightful adminiſtrator againſt an executor *de ſon tort*, he could not give in evidence payment of debts to the value for ſuch goods as were ſtill in his cuſtody, but only for ſuch as he had ſold.

Ca. K. B. 472. Carth. 104. Ca. K. B. 441. Cheſhold v. Meſſenger, coram Parker Ch. B. at Glouceſter, 1747. Salk. 285.

If an adminiſtrator bring trover on his own poſſeſſion, the defendant may upon the general iſſue give in evidence a will and executor; but if the action be brought on the poſſeſſion of the *inteſtate*, the defendant muſt plead it in abatement, and cannot give it in evidence on not guilty.

1 Danv. 25.

Mr. *Danvers* ſays there is no plea in trover, but a releaſe and not guilty; for every plea in juſtification is tantamount, and Lord Ch. Juſt. *Holt* in the caſe of *Hartford* and *Jones*, *Salk.* 654. ſays, he never knew but one plea that was good, and refers to a caſe in *Yelverton* 198. where in trover for two butts of wine, the defendant pleaded that he took them for priſage for the king, and there is another ſpecial plea in 2 *Bulſtr.* 289, that was holden good, *viz.* That the defendant kept a common inn, and that a ſtranger brought the plaintiff's horſe there; and that not being paid for his meat, he detained the horſe there; but for the reaſon given by Lord Ch. Juſt. *Holt* in the caſe of *Hartford* and *Jones*, ſetting aſide a ſpecial plea (that the goods were caſt away, and that he ſaved them, and detained them till he was paid for his pains) *viz.* That if a detainer be lawful, it does not confeſs a converſion (which is certainly law) that plea ought not to have been allowed. And in *Wingfield* v. *Stratford*, *H.* 25 *G.* 2. *K. B.* it was holden by the whole court, that there could be no ſpecial plea in trover, but a releaſe. But as the defendant cannot plead the ſpecial matter, he may give it in evidence on the general iſſue; and therefore in trover for a gun, the defendant may give in evidence, that he was gamekeeper of the manor of *B.* and took the gun by the 22 & 23 *Car.* 2. though the

V. Ro. Rep. 44. a juſtification by force of a cuſtom holden good.

Dane and Walter in Kent, 1682.

the act do not authorize the pleading the general issue: and therefore it would be otherwise in trespass for taking it.—Yet where in trover for goods, the defendant pleaded that the plaintiff had brought the like action against *J. S.* for the same goods, and had recovered, and had execution; upon demurrer, the plea was holden to be good: and it was said, that where the demand and recovery is of a thing certain, as where two are bound in 100*l.* bond, jointly and severally, there recovery and execution against one is not a bar against the other: for execution is no satisfaction for the 100*l.* demanded: but where the demand and recovery is of a thing incertain, as where trespass is done by two, which rests only in damages, if the plaintiff recover against one, that judgment is a sufficient bar against the other; for *transit in rem judicatam*; the property of the goods is changed, so as he may not seize them again. Yelv. 67.

Note; In general cases it is not allowed to bring the thing into court for which the action is brought; yet I have known it under particular circumstances, where the court would discountenance the action: and it appears from Mr. *Barnes's Notes* that in the common pleas it has been often done. Salk. 597. Str. 142. Everard and Lathbury, Mich. 17 G. 2. K. B.

The rule seems to be, that *bona peritura* and cumbrous goods shall not be permitted to be brought into court; but in other cases they may, upon an affidavit that they are in the same plight and condition as when taken. Fisher v. Prince, B. R. 1762.

Where goods are cumbrous, the court will grant a rule to shew cause, why on the delivery of the goods to the plaintiff, and paying costs, proceedings should not be staid. Cook v. Holgate, C. B. Tr. 10 G. 2. Watts v. Phipps, B. R. East. 7 G. 3.

CHAPTER III.

Of Detinue.

DETINUE lies for the recovery of goods in specie, and also for damages for the detainer, and it lies against a person who has them either by delivery or finding: but as in this action the defendant may wage his law, trover is the action in more common use.

I have already taken notice, that the declaration in this action must contain more certainty than is necessary in trover; in most other respects it agrees with that action. It may be brought by one having a special property; so, by one having a property without possession. It will lie for a piece of gold, value twenty-one shillings; for that is a demand of a thing certain: but it will not lie for money out of a bag, though in that case trover will, because in that action damages only are to be recovered.

2 R. A. 703.
2 Danv. 520.
Str. 142.

And it has been said, that it would not lie for hawks, hounds, apes or popinjays, or such like things which are *feræ naturæ*, though made tame; yet trespass will lie in such case, because in that the plaintiff recovers only damages for the taking, and not the things themselves.

Br. Detinue 44.

If a man detain the goods of a feme covert, which came to his hands before the marriage, the husband can only bring detinue; because the law transfers the property to him, and the detainer is the cause of action. But in such case the wife might join in an action of trover, because the inception of the cause of action was in her by the trover.

2 Lev. 101.

If *A.* deliver goods to *B.* to deliver to *C. C.* may bring detinue against *B.* for the property is vested in him by the delivery to his use. So if a man deliver goods to *B.* and after grant them to *C.* the grantee may have detinue, but not the grantor.

1 R. A. 606.

If the bailee of a thing burn it, his executor shall not be charged in detinue, because he shall not be charged without a possession in himself; for the action dies with the person.

1 R. A. 607.

Where a man comes to a shop to buy goods, and they agree upon a price, and a day of payment, and the buyer takes them away, detinue will not lie; because the property was changed by a lawful bargain; but if they agree for present money, and the buyer take the goods away without payment, detinue lies, because the property is not altered. So if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies, because the property is in the buyer; but earnest does not alter the property, but only binds the bargain; and therefore if no other time for payment be appointed, the money must be paid on fetching away the goods: the earnest gives the party a right to demand; but a bare demand without payment is void. After earnest the vendor cannot sell the goods to another, without a default in

Cr. El. 867.
Ca. K. B. 345.
Salk. 113.
Ibid.

in the vendee; and therefore if the vendee do not come and pay, and take the goods, the vendor ought to request him; and then, if he do not in convenient time, the agreement is dissolved, and the vendor at liberty to sell to another person.

By the act of navigation, certain goods are prohibited under pain of forfeiting them, one part to the king, another to him that will inform, seize or sue for the same; any person may bring detinue for such goods; for the bringing of the action vests a property in him. Salk. 223.

If I deliver goods to *B.* who loses them, and *D.* find them, and deliver them to *J. S.* who has a right thereto, I cannot bring detinue against *D.* because he is not privy to my delivery. 2 Danv. 511.

The plaintiff must prove an actual possession in the defendant, and the detainer of the goods precisely as mentioned in the declaration; and therefore if detinue be brought for a bond, and it is proved to be for a greater or less sum, it is not sufficient. 1 R. A. 703.

The gist of the action is the detainer: therefore if goods be delivered to baron and feme, the detinue shall be only against the baron; but if goods come to a feme covert before marriage, the action must be brought against the husband and wife. Ro. Rep. 128. Co. L. 351.

If the defendant plead *non detinet*, he may give in evidence a gift by the plaintiff, for that proves he does not detain the plaintiff's goods; but he cannot give in evidence that the goods were delivered as a pledge, *&c.* as he might in trover. Co. L. 283.

In detinue for a deed, the defendant after a general imparlance, *proferendo hic in cur'* the said deed, pleaded that it was delivered to him by the plaintiff and *J. S.* *ad custodiend' sub certis conditionibus, et quod ipse paratus est ad deliberand' cui vel quibus cur' consideravit, &c. Sed utrum conditiones illæ ex parte prædicti querentis adimpletæ sunt ipse omnino ignorat et petit quod idem* J. S. *præmuniatur.*—The plaintiff demurred; but the court held, a prayer of garnishment may be after an imparlance, *ideo preceptum est vic' quod per probos homines, &c. Sci. fa. quod sit hic, &c.* Hancock v. Baddy, Pasc. 28 Car. 2.

The judgment in this action is to recover the thing itself, or the value thereof, therefore the jury must find the value; and if they find damages and costs, and no value, it shall not be supplied by a writ of enquiry. 10 Co. 119.

The jury ought to find the value of every particular thing demanded; but a flock of sheep is intire, *&c.* Ibid.

CHAPTER IV.

Of Replevin.

THE action of replevin is of two ſorts. 1. In the *detinet*. 2. In the *detinuit*; and may be brought in any caſe where a man has had his goods taken from him by another.

Where the party has had his goods re-delivered to him by the ſheriff, upon a writ of replevin, or upon a plaint levied before him (which by the ſtatute of *Malbridge* the ſheriff may take out of the county-court, and make replevin preſently,) the action is in the *detinuit*; but where the ſheriff has not made ſuch replevin, but the defendant ſtill has the goods, the action is in the *detinet*: however of late years, no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it.

The advantage the plaintiff has in bringing an action of replevin in the *detinet*, in preference to an action of treſpaſs *de bonis aſportatis*, is, that he can oblige the defendant to re-deliver the goods immediately, in caſe upon making his avowry they appear to be repleviſable; but as in ſuch caſes he may more ſpeedily have them delivered to him by application to the ſheriff in the common way, it is of no uſe, unleſs the diſtrainer have eſloined the goods ſo that the ſheriff cannot get at them to make replevin; and in ſuch caſe he may bring an action of replevin in the *detinet*, and after avowry pray that the defendant may gage deliverance; or he may upon a return of an *elongavit* to the *pluries* writ of replevin, have a writ to the ſheriff commanding him to take other beaſts of the defendant in withernam; but if the defendant before the return of the withernam appear to the writ of replevin, and offer to plead *non cepit*, it ſhall ſtay the withernam; for the defendant ſhall not be concluded by the return of an *elongavit*, for the ſheriff can make no other return, where he cannot find the thing to be replevied. Ca. K. B. 37.

Where the perſon taking the goods claims property in them before the ſheriff, he cannot make replevin of them: but in ſuch caſe the party may ſue out a writ *de proprietate probanda*, upon which the ſheriff muſt have an inqueſt of office; and if

upon

upon such inquisition the property is found in the plaintiff, the sheriff shall make replevin, *aliter non*; but though the property be found in the defendant, yet the plaintiff is not concluded, for he may still have his action of replevin, or of trespass; but if in an action of replevin the defendant plead property, and it be found for him, the plaintiff is concluded.—So if goods be taked in execution (or on a conviction before justices) the sheriff shall not make replevin of them, and if in such case the sheriff should make replevin, he would subject himself to an attachment; for goods are only replevisable where they have been taken by way of distress: Lord *Coke* therefore defines replevin to be a remedy grounded upon a distress, being (as he says) a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to re-deliver the distress if judgment shall be against him.

Stra. 1184.

Co. L. 145.

He that brings replevin must have an absolute, or at least a special property in the thing distrained; and therefore several men cannot join in a replevin, unless they be jointenants or tenants in common.

Ibid.

Executors may have a replevin of a taking in *vitâ testatoris*. So if the cattle of a feme sole be taken, and she afterwards intermarry, the husband alone may have replevin. But if they join, after verdict judgment will not be arrested, because the court will presume them jointly interested, (as they may be, if a distress be taken of goods of which a man and woman were jointenants, and afterwards intermarry); the avowry admitting the property to be in the manner it is laid.

Arundel and Trevil, Sid. 82. F. N. B. 69. Bourne & Ux. v. Mattaire, P. 8 G. 2.

The declaration ought to be certain in setting forth the number and kinds of cattle distrained, because otherwise the sheriff cannot tell how to make deliverance if it should be necessary; yet an avowry may make that good which would be bad on demurrer, both parties agreeing what the *quantum* and the nature of the goods are; and if the declaration were for taking fourteen skimmers and ladles, and three large pots and covers. And the sheriff may require the defendant to shew him the goods, and it would be a good return to say *nullus venit ex parte defendentis ad ostendendum bona et catalla*.

Aleyn 32. Stile 71.

Bourne and Mattaire.

The declaration ought to be not only of a taking in a vill or town, but also *in quodam loco, vocat'*; but if the defendant would take advantage of this, he must demur to the declaration.

Hob. 16. Bullythorp and Turner, Tr. 1 & 17 G. 2. C. B.

 A man

F. N. B. 68. Salk. 176. A man may count of feveral takings, part at one day and place, and part at another: and if the plaintiff alledge two places, and the defendant anfwer only one, *i. e.* if the plea begin only as an anfwer to part, and be in truth but an anfwer to part, it is a difcontinuance, and the plaintiff muft not demur, but muft take his judgment for that by *Nihil dicit*; for if he demur or plead over, the whole action is difcontinued. But if a plea begin with an anfwer to the whole, but is in truth but an anfwer to part, the whole plea is nought and the plaintiff may demur. Str. 507. Where the defendant avows at a different place, in order to have a return, he muft traverfe the place in the count, becaufe his avowry is inconfiftent with it. But where he does not infift upon a return, he may plead *non cepit*, and prove the taking to be at another place, for the place is material.—Walton v. Kirfop C. B. Mich. 8 G. 3. This is to be underftood, where the defendant never had the cattle in the place laid in the declaration at all; for if, on the plea of *non cepit*, the plaintiff prove that the defendant had the cattle in the place laid in the declaration, he will have a verdict: and if the fact be that the defendant took the cattle in another place, and only had them in the place mentioned in the declaration in the way to the pound, he ought to plead that matter fpecially.

2 Vent. 249. The general iffue in replevin is *non cepit*, upon which property cannot be given in evidence, for that ought to be pleaded; 1 Salk. 5. Co. L. 145. and if he plead property in himfelf, he may either plead it in bar, or in abatement; but if he plead it in a ftranger, 2 Lev. 92. it ought properly to be pleaded in abatement, though it may then likewife be pleaded in bar.

Carth. 243. If the defendant plead property, whether it be in himfelf or a ftranger, he fhall have a return without making an Salk. 94. avowry for it; but where the plea in abatement is of a collateral matter, fuch as *cepit in alio loco* he muft make an avowry in order to have a return, for he muft fhew a right to the property, or at leaft to the poffeffion, to have a return: Bullythorp and Turner. but the plaintiff ought not to traverfe the matter of the conufance; and if he do, and demurrer be joined upon it, it is a difcontinuance, and the defendant will have judgment.

1 Danv. 652. The defendant may either avow the taking, or juftify it; if he avow, it muft be upon a right fubfifting, fuch as rent arrear, &c. and then he intitles himfelf to a return; but where by matter fubfequent, he is not to have the thing for which

which the distress was taken, there he will not be entitled to a return, and therefore cannot avow, but must justify; as if a lord distrain for homage, and afterward the tenant die, and then his executor bring replevin. But a man may distrain for one thing, and avow for another. 3 Co. 26. a.

By 11 *G*. 2. *c*. 19. Any person distraining for rent, relief, heriot or other service, may in replevin avow or make conusance generally, without setting out a title.—By 4 *G*. 2. *c*. 28. a man may distrain for rent-seck, rent of assize and chief-rents, which have been paid for three years, within twenty before the first day of the then sessions (which was in 1731,) or which may thereafter be created, as in case of rents reserved upon lease.

Note; if the defendant acted as bailiff to another, he is not said to avow, but to make cognizance, *i. e.* instead of saying *bene advocat captionem*, he says *bene cognovit captionem*. And if the defendant make cognizance, as bailiff to *J. S.* the plaintiff may traverse his being bailiff, for this is different from trespass *quare clausum fregit*, for there, if the defendant justify an entry by command, or as bailiff to one in whom he alledges the freehold to be, the plaintiff shall not traverse the command, because it would admit the truth of the rest of the plea, *viz*. That the freehold was in *J. S.* which would be sufficient to bar his action. But in trespass *de bonis asportatis, ex. gr.* for taking the plaintiff's sheep, if the defendant justify the taking them damage-feasant as servant to *J. S.* the plaintiff may traverse the command or authority; for though *J. S.* had a right to take the cattle, yet a stranger who had no authority from him will be liable. Salk. 107. King's Rep. 51. Ibid.

And there is a great difference between a justification in trespass, and an avowry in replevin, in another respect, *ex. gr.* for an amerciament in a court-leet; in the justification it is necessary for the defendant to set forth a warrant or precept, *&c.* but not to aver the matter of presentment, because his plea is only in excuse; but in avowry he ought to aver in fact that the plaintiff committed the crime for which he is amerced, because he is an actor, and is to recover, which must be upon the merits. Salk. 107.

In trespass for breaking and entering the plaintiff's house, and taking his goods, the defendant pleaded, that the house is parcel of an half yard-land, holden of the earl of *Northumberland*,

berland, by homage, fealty, escuage incertain, suit of court, inclosing his park with pales, and rent of a pound of comyn: and for three years rent arrear, and for the homage and fealty of the tenant, he by the earl's command, entered and took, &c. The plaintiff traversed the tenure *modo et forma*. Special verdict that he held of the earl by homage, fealty, inclosing his park, rent of a pound of comyn, *et non aliter*; and judgment for the defendant; for though the verdict do not agree with the plea in the manner and nature of the tenure, yet it agrees in substance in the point for which the distress was made; and that is sufficient: for there is a difference between trespass and replevin, for in replevin it behoves the avowant to make a good title *in omnibus*.

1 Saund. 285. Moor 281. Salk. 580.

If an avowry be made for rent, and it appear by the defendant's own shewing, that part of it is not yet due, yet the avowry will be good for the residue. In such case the avowant must abate his avowry *quoad* the rent not due, and take judgment for the rest; but if it appear that he has title only to two undivided parts of the rent, the avowry shall abate.

Ca. K. B. 84. Comb. 346. 1 Saund. 191.

So if the avowry be for part of a quarter or half a year's rent, he must shew how the rest is satisfied, or it will be bad.

1 Saund. 286. Hob. 133.

In avowry for rent and a *nomine pœnæ* together, without alledging any demand of rent, the avowry is good for the rent, though it will be ill for the penalty.

Avowry for rent due at a latter day, is no bar in avowry for rent due at a former day; but an acquittal under seal is; but if not sealed, contrary proof will be admitted.

By the 32 *H.* 8. *c.* 37. The executors and administrators, of tenants in fee, fee tail or for life, or rent services, rent charges, rent seck and fee farms, may distrain upon the lands chargeable, so long as they remain in the possession of the tenant, who ought to have paid; or of any other person claiming under him by purchase, gift or descent. The like remedy is given to husbands after the deaths of their wives, and to other persons after the death of the *Cestui que vie*. Lord *Coke* says, that the preamble concerning the executors and administrators of tenant for life, is to be intended of tenant *pur auter vie*, so long as *Cestui que vie* liveth: however it has been since determined to extend to all tenants for life.

1 Raym. 173.

Pool and Duncomb, Tr. 1657.

Tenant for life of a rent-charge confessed a judgment, which was extended by *elegit*; tenant for life died, conusee distrained, and

and in replevin avowed for the arrears incurred in the life of tenant for life; and upon demurrer the distress was holden to be bad, and not warranted by the statute. 1. Because the case of the conusee is not enumerated in it. 2. Because he comes in in the *post*. and not under the tenant for life.—The executor of a grantee of a rent-charge for divers years, if he so long live, is not within the statute.

Lord *Coke* says, if a man make a lease for life, or a gift in tail, reserving a rent, this is a rent-service within the statute; from whence it may be inferred, that he thought that a rent reserved upon a lease for years was not within it, and I apprehend that it is not, for the landlord is not tenant in fee, fee-tail or for life of such a rent; and it is the executors of such tenants only who are mentioned in the act. However in trespass, where it appeared the defendant had distrained the plaintiff's goods for rent due to his testator upon a lease for years, Lord Chief Justice *Lee* held it to be within the statute, and the defendant obtained a verdict. Powel and Killick at Westminster. M. 25 G. 2.

The act does not extend to rents out of copyholds. Yelv. 135.

By 21 *H*. 8. *c*. 19. If the avowry, cognizance or justification be found for the defendant, or the plaintiff be nonsuited, the defendant shall recover such damages and costs as the plaintiff would have had if he had recovered.—But note, this act mentions only persons avowing or making cognizance for rent-service, customs, services, damage feasant, or for other rent or rents; so that it does not extend to an avowry for a *nomine pœnæ*, or for an estray; and therefore, if in such case damages and costs were given, the judgment would be reversed. 1 Jones 135.

In replevin the defendant avowed for 36 *l*. rent for a year and half: The plaintiff pleaded payment of 12 *l*. and issue thereon, and another issue as to the 24 *l*. The first issue was found for the plaintiff, and damages and costs taxed by the jury: But the second issue being found against the plaintiff, so that the defendant was entitled to a return and to damages and costs, it was upon motion holden, that the jury finding damages and costs for the plaintiff was void. Cr. J. 473.

By 17 *Car*. 2. *c*. 7. If the plaintiff in replevin be nonsuited before issue joined, the defendant making a suggestion in nature of an avowry or cognizance for rent, the court

shall

Cooper and Sherbrook, E. 32 G. 2. C. B.

ſhall award a writ to enquire of the rent in arrear, and of the value of the diſtreſs. * Note; it has been the cuſtom ever ſince this ſtatute (as it was before) to enter judgment for a *retorn' habend'*; but notwithſtanding the defendant may enter a ſuggeſtion on this ſtatute, and a writ of ſecond deliverance will be no *ſuperſedeas* to ſuch writ.—The whole fact is to be proved, and may be litigated on the writ of enquiry.

1 Lev. 255.

Tucker and Stevens, P. 6 G. 1. C. B. Carth, 362.

Valentine and Fawcet, 8 G. 2. Salk. 95.

By the ſame ſtatute, in caſe the plaintiff be non-ſuited after avowry or conuſance made, and iſſue joined, or if the verdict ſhall be given againſt him, the jury ſhall at the prayer of the defendant enquire concerning the ſum of the arrears, and the value of the goods and cattle diſtrained, and thereupon ſhall have judgment for ſuch or ſo much thereof, as the goods and cattle diſtrained amounted unto. But in ſuch caſe if the jury omit to enquire of the value of the rent arrear or of the cattle, it cannot be ſupplied by a writ of enquiry, becauſe the ſtatute confines the enquiry to the jury impanelled in the cauſe. Therefore in ſuch caſe the defendant muſt take judgment *de retorno habendo* at common law; but it is not the ſame upon 21 *H.* 8. nor upon the 43 *El. c.* 2. if the defendant avow as overſeer for a diſtreſs for a poor's rate, becauſe if the jury had enquired, it had been as an inqueſt on which no attaint would have lain, and the ſtatute does not tie it up to the ſame jury. And if the plaintiff being non-ſuited bring a writ of ſecond deliverance, though it will be a *ſuperſedeas* to the writ *de retorno habendo*, yet it will be none to the writ of enquiry.

Ca. K. B. 519, 610.

Note; in writs of enquiry the jury ſet their hands and ſeals to the verdict; and upon the trial of ſuch writs the judge of *Niſi Prius* is only aſſiſtant to the ſheriff and has no judicial power; and if the parties come to any agreement at the trial, the way is to bring it to the judge to ſign, and after move above to have it made a rule of court.

The writ of ſecond deliverance is a judicial writ depending upon the firſt original, and is given by 13 *E.* 1. *c.* 2. which recites, that after the return is awarded the party diſtrained does replevy again, and ſo the judgments given in the king's courts take no effect, wherefore it enacts, that when return is awarded to the diſtrainer, the ſheriff ſhall be commanded by a judicial writ to make return, in which it ſhall

be

be expressed, that the sheriff shall not deliver them without writ, making mention of the judgment. And it further enacts, that if the party make default again, or for any other cause return of the distress be awarded, being now twice replevied, the distress shall remain irreplevisable.

By 4 & 5 *Ann. c.* 16. The plaintiff, with leave of the court, may plead as many pleas as he shall think necessary; and if a verdict be found on any issue for the defendant, costs shall also be given; unless the judge certify that the plaintiff had a probable cause to plead such matters. Bright and Jackson, 28 G. 2. C. B.

If issue be joined on the property, the defendant may give in evidence, the plaintiff's having the cattle in mitigation of damages. Godb. 98.

If the plaintiff plead *riens* arrear in bar to an avowry for rent, he cannot upon such issue give in evidence *non-tenure*.

If the defendant avow the taking damage feasant, and the plaintiff prescribe for common for all commonable cattle, and upon issue joined thereon, give in evidence common for sheep and horses only, this will not maintain the issue; but if he had a general common, and prescribed for common for any particular sort of cattle, it would be good. Pring and Henley, per Ward, Ch. B. at Exon 1700.

If a man prescribe for a certain number of cattle, it is not necessary to shew they were levant and couchant, because it is no prejudice to the owner of the soil, the number being ascertained: But if the prescription be for a number uncertain, they must be levant and couchant; but a prescription for all cattle levant and couchant will be good; and need not be for all his cattle; for levancy and couchancy are a sufficient ascertaining what cattle may be put in, for no more shall be said to be levant and couchant than the land is sufficient to maintain, and if the plaintiff were guilty of any fraud as to that the defendant may take advantage of it in pleading. If the jury find the plaintiff has common by prescription *prout* he has prescribed, paying for it every year one penny to the defendant; the plaintiff fails in his prescription, for it is intire, and the payment of one penny parcel of it. But in *Gray* v. *Fletcher*, where the copyholder prescribed to have common, and the jury found he had common *prout* he had prescribed, but also found that the copyholders of that manor had used to pay to the lord a hen and five eggs yearly *pro eadem communia*, it

Raym. 726. Handing and Johnson, M. 20 G. 2. 1 Vent. 54. Lovelace and Reynolds, Cr. E. 546. 563. 5 Co. 78. Cro. El. 405.

it was adjudged to be well; for they were two prescriptions, and the distinction between this case, and the case of *Lovelace* and *Reynolds*, was taken and allowed in *Kenchin* and *Knight*, *Mic.* 23 *G.* 2.

Hob. 209. So if a man prescribe for common appendant to 300 acres in four towns, and the evidence is, that it is appendant to 200 acres, in two of the towns only, this will not maintain the issue; but if he prescribe for common appendant to his house and 20 acres, and upon evidence it appears that he has but 18, that will maintain his issue.

1 Cr. 531.

F. N. B. 159. If a man avow taking the cattle, damage feasant, and the plaintiff plead tender of amends and a refusal, he shall recover damages for the detaining, and not for the taking, because the taking was lawful; but if the tender were before the taking, the taking is tortious; if after impounding, neither the taking nor detaining is tortious. And after the avowant has had return irreplevisable, yet if the plaintiff make sufficient tender, he may have detinue for the detainer after.

Salk. 584. 8 Co. 147.

In an avowry for rent the plaintiff may plead a tender and refusal, without bringing the money into court; because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages.

Note; That in order to prevent vexatious replevins of distresses for rent, the 11 *G.* 2. *c.* 19. enacts, that sheriffs and other officers granting replevins, shall take from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (to be ascertained by oath) conditioned for prosecuting the suit with effect, and for a return of the goods; and the sheriff is authorized to assign the bond to the avowant or person making conusance; and if the bond be forfeited, the avowant may bring an action in his own name, and the court may by rule give relief to the parties, *&c.*

Prowse and Pattison, Hil. 13 G. 2. It has been holden, that an action upon the case will lie against a sheriff for taking insufficient pledges, and that without any previous *sci. fa.* against the pledges.

Saunders v. Darling and another, Sittings at Westminster, C. B. Tr. 10 G. 3. In such action against the sheriff, some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof on the sheriff: For the sureties are known to him, and he is to take care that they are sufficient.

In

In replevin, both plaintiff and defendant are actors, therefore either party may carry down the cause; and if the defendant give notice, and do not go on to trial, the court will give costs against him; for the same reason, the defendant may not move for judgment of nonsuit, unless the plaintiff have given notice of trial. Eggleton and Smart, Tr. 2 G. 3.

CHAPTER V.

Of Rescous.

RESCOUS is where the owner, or other person, takes away by force a thing distrained from the person distraining, but the person must be actually in possession of the thing, or else it is no rescous; as if a man come to make a distress, and he be disturbed to do it; but the party may bring an action on the case for this disturbance. F. N. B. 102.

The plaintiff ought to count for what rent or services he took the distress, and the defendant may traverse the tenure. F. N. B. 230.

If a man send his servant to distrain for rent, *&c.* and rescous be made, the master shall have the writ, and he may join in the writ for the assault and battery of the servant. Co. L. 47. 160. Salk. 247.

If a distress be taken without cause as where no rent is due, one may make rescous before the cattle is impounded. So if the owner tender the rent before the distress taken.

If a man distrain 40 sheep of *A.*'s, and as many of *B.*'s damage feasant, *A.* cannot by reason of the right of common in the place where, and that he could not separate his sheep from *B.*'s, justify rescuing *B.*'s sheep with his own. Cr. J. 468. *N. B.* The beasts must be damage feasant at the time of the distress, and if they were damage feasant yesterday, and again to-day, they can only be distrained for the damage they are then doing. Co. L. 161. But by 11. *G.* 2. *c.* 19. If the lessee fraudulently convey Ca. K. B. 660.

his goods from the premisses, the lessor may within thirty days seize them as a distress, where-ever found.

Heath's Maxim 76.

If the defendant plead Not Guilty, (which is the general issue) he cannot give in evidence non-tenure of the plaintiff who distrained for rent, but he ought to plead it.

But this action is rarely brought now-a-days, but a special action upon the case, in which non-tenure might be given in evidence on the general issue.—Note; by 2 *W. & M. c.* 5. *s.* 4. the plaintiff shall recover treble damages, if the distress be for rent, in such action upon the case for an unlawful rescous.

6 M. 211.

Rescous may likewise be made of any one taken up on legal process, and for such rescous the plaintiff may bring an action of rescous, or an action on the case against the rescuers. To support his action, it will be necessary for him to prove, 1. The original cause of action. 2. The writ and warrant; which must be by producing sworn copies. 3. The arrest to shew it legal. 4. In point of damage, it is expedient to prove that the person arrested became insolvent, or not to be found; but this is not necessary, for the defendant being guilty of violence against the process of the law shall have no favour. However he may give in evidence, in mitigation of damages, the ability of the person arrested, or that he is still amenable to justice; yet if the jury give the whole debt in damages, the court will not grant a new trial.

Jenk. 311. pl. 92.

6 M. 211.

The person rescued may be a witness for the defendant, and though he be *particeps criminis*, if the defendant be guilty yet it shall only go to his credit.

Salk. 79.

Horner v. Battyn & al. B. R. H. 12 G. 2.

Note; That bare words will not make an arrest, but if the bailiff touch the person, it is an arrest, and the retreat a rescous. On a motion for an attachment against three persons for a rescous of a person taken in execution, it was objected that there had not been a legal arrest, as the bailiff had never touched the defendant—*per curiam*, this is a good arrest; and if the bailiff who has a process against one, says to him when he is on horseback, or in a coach, "you are my prisoner, I have a writ against you," upon which he submits, turns back or goes with him, tho' the bailiff never touched him, yet it is an arrest, because he submitted to the process: but if instead of going with the bailiff, he had gone or fled from him, it could be no arrest unless the bailiff had laid hold of him.

By

By 29 *Car.* 2. *c.* 7. *s.* 6: An arrest may be made on a *Sunday* for treason, felony, or breach of the peace; but in other cases, an arrest on a *Sunday* is void, insomuch that the party may have an action of false imprisonment: But a person may be re-taken on a *Sunday*, when arrested the day before. So bail may take their prisoner on a *Sunday*, and render him on the next day. Salk. 78. 2 Mod. 230.

Chief Justice *Holt* doubted whether an arrest made by a bailiff's servant would be lawful, even though in the presence of a bailiff; and where the bailiff sent his follower up stairs to arrest a man who was rescued by the defendant, reserved the case for his opinion. But howsoever such a case might be determined, yet it would certainly not be good, if the bailiff were not *quodam modo* in his company. 6 M. 211.

It is not necessary to shew the warrant, or to tell at whose suit you arrest him, unless he demand it: And if you have two warrants in your pockets against him and produce neither, if he be rescued, either party at whose suit the warrants were made out may bring an action against the rescuers. Cr. J. 485.

If the party rescued were taken upon process of execution, the sheriff may maintain an action against the rescuers, because he is liable to an action of escape; for he cannot return a rescous as he may upon mesne process. But if the prisoner had been once in gaol upon mesne process, the sheriff ought at his peril to keep him, and a rescous from thence is no excuse for him, neither is it an excuse where the sheriff is bringing him up by *habeas corpus*; and consequently in such case likewise, he may have an action against the rescuers. Cr. J. 419. 1 R. R. 440. 1 Str. 434.

In the return of a rescous, it is not necessary to aver the place where the rescous was made, if the place of the arrest be shewn, for the rescous shall be intended to be in the same place.—It seems as if such a return is traversable. *Rex* v. *Clark* and others, *Tr.* 29 *Car.* 2. Dy. 212. S. P.

CHAPTER VI.

Of Caſe for Miſbehaviour in an Office, Truſt or Duty.

ANOTHER action which may be brought for an injury affecting a man's perſonal property, is treſpaſs; but as that lies likewiſe for an injury affecting his real property, I ſhall defer what I have to ſay upon it to the next book, and proceed in the preſent place to take notice for what miſbehaviour in an office, truſt or duty, an action on the caſe will lie.

Bag's Caſe, 11 Co. Walker and Griffiths, M. 26 Geo. 2. It is the proper remedy for all falſe returns by a ſheriff. So if a mayor, &c. return a good cauſe to a *mandamus*, the matter of which is falſe; though now by 9 *Ann.* c. 20. ſ. 2. the party may in many caſes traverſe the return, and is not put to his action.

(Note; an action for a falſe return ought to be laid either in the county of *Middleſex*, where the return is, or in the county where it was made.)

1 Vent. 55. So for a wilful miſbehaviour in a miniſterial office, by which the party is damnified; as denying a poll to one who 2 Lev. 55. ſtands candidate for an elective office (ſuch as bridge-maſter;) and it need not he averred in the declaration, that he would have been choſen if the poll had been taken. So for refuſing to take his vote at an election. So for not returning him who is duly choſen.

1 Leon. 323. If my ſervant be robbed, and he go to a juſtice of peace, and pray to be examined touching the robbery, and the juſtice refuſe to examine him, ſo that I am thereby damnified, and cannot proceed againſt the hundred, I may have an action againſt the juſtice.

6 Co. 141. If a ſheriff or any other officer ſuffer any perſon who is arreſted, or taken in execution, to eſcape, the party at whoſe ſuit, &c. may have a ſpecial action on the caſe againſt him; and it is not neceſſary to ſet forth all the formalities re- Carth. 148. quired by law in other caſes; and therefore, if upon a judgment by a teſtator, his executor bring a *ſci. fa.* and have judgment, whereupon a *ca. ſa.* iſſues and the perſon is taken and eſcapes; in an action againſt 1 Saund. 37. the ſheriff the plaintiff may declare briefly upon the judgment in the *ſci. fa.* But if he declare that he ſued out a writ of

execution

execution, without setting forth any judgment, it will be an incurable fault; for by this means the defendant loses the benefit of pleading *nul tiel record*. But though error be in the process, the sheriff cannot take advantage of it. Cr. J. 289. Sty. 232.

Yet where an action was brought against the marshal of *K. B.* for not receiving a copy of a declaration against a prisoner *per quod* he lost his suit; it appearing that the declaration was tendered at the prison, before the bill was filed, the plaintiff was nonsuited, though it was strongly insisted that an officer could only take advantage of process being void, and not of its being voidable. Ekins and Ashton, Mid. 1752. per Lee Ch. J.

And where a *ca. sa.* was executed on a judgment given in an inferior court in debt upon a bond made *extra jurisdictionem*, and an escape, the court held no action would lie for the escape; because *coram non judice*. March 8. Post 65.

Case will lie for the party against the sheriff, for an escape suffered upon an outlawry or mesne process; for though the party is in custody merely at the suit of the king, and the plaintiff has no interest in his body, yet he cannot have his outlawry reversed without security first given to appear to a new original. Fitzg. 265. Cr. E. 652. S.P.

If the plaintiff declare that he had *J. S.* and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being a debt due from the wife before coverture), and that he escaped, he shall have judgment; for the substance of the issue is found. 1 Sid. 5.

So if both baron and feme be taken in execution, and the feme be suffered to escape, an action will lie, though the baron continue in prison. 1 R. A. 810. c. 5.

So if the jury find that *J. S.* was taken by the former sheriff, and that he was legally in the custody of the defendant, who suffered him to escape. So if they find he was taken on an *alias ca. sa.* where the plaintiff declares on *ca. sa.* So if the escape be proved on another day, if it be before the action commenced. Cr. J. 380. Hob. 55. Cr. J. 380.

So if it be alledged that the prisoner was surrendered to him in the parish of *B.* and it is proved to be in the parish of *A.* for the surrender is the material thing, and it differs from trespass, where every part of the declaration is descriptive. Oats and Machin, Tr. 9 G. I. per Raym.

Tildar and Sutton. T. 2. An. per Holt, G. Hall. Salk. MSS. Johnson and Gibbs, Exon. 1698. per Holt, Salk. MSS.

The plaintiff need neither produce the *ca. sa.* nor the copy of it, but the return of it is sufficient, and the *ca. sa.* need not be set forth in the declaration. But if it be set forth with a *scilicet*, that it issued on such a day, it may be doubtful whether he ought not to prove the *ca. sa.* with the true *teste*; otherwise against the sheriff, the warrant is sufficient evidence, tho' it would not be so for him.

1 Raym. 190.

The confession of the under-sheriff is evidence against the sheriff, because in effect it charges himself.

Carth. 148. Ante 64.

If it appear in evidence that the prisoner was taken upon a void judgment, the plaintiff cannot recover; but it is otherwise in the case of an erroneous judgment.

Note; where the court in which judgment was obtained had cognizance of the cause, the judgment is only erroneous; but if the court had no jurisdiction, it is void.

Cr. E. 188.

So where the defendant is taken on a *ca. sa.* issued after the year, and escapes, debt will lie against the sheriff, though the process erroneously awarded; for the sheriff may justify in an action of false imprisonment, and therefore may not set him at large.

Salk. 274.

Note; That if *A.* be in custody at the suit of *B.* and a writ be delivered to the sheriff at the suit of *D.* the delivery of the writ is an arrest in law; and if *A.* escape, *D.* may bring debt against the sheriff for an escape.

2 Lev. 85.

If the plaintiff declare, That whereas he had a good cause of action against *J. S.* and sued out a *latitat* against him, that the defendant arrested him, and suffered him to escape; he must prove a cause of action, else he will be nonsuited; though the cause of action need not be for the same sum mentioned in the declaration: but if the declaration be of a *latitat* in a plea of trespass, and the writ produced be in a plea of trespass, *ac etiam billae* 20*l.* it will not support the declaration.

1 R. A. 808. 4 Co. 84.

If the prison take fire, or be broken open by the king's enemies, by means whereof the prisoners escape, this will excuse the sheriff; but it is otherwise if the prison be broken open by the king's subjects.

If a prisoner in execution escape without the assent of the sheriff, and he make fresh suit, and retake him before any action brought against him, this will excuse him: but by 8 & 9 *W.* 3. *c.* 26. *s.* 6. he cannot give this in evidence, but

must

must plead it, and must likewise make oath, that the prisoner made such escape without his consent, privity or knowledge.

If the plaintiff in his declaration set forth a voluntary escape, the defendant may plead that he retook him upon fresh suit, without traversing the voluntary escape; for the alledging it is in no wise necessary to this action, but should come in in the replication. 1 Vent. 211.

Note; For a voluntary escape an action will lie against the gaoler as well as against the sheriff, because he is a wrong-doer; but for a negligent escape it will only lie against the sheriff. Salk. 18.

And note, that to prove a voluntary escape the party escaping may be a witness, because it is a thing of secrecy, a private transaction between the prisoner and the gaoler. Rex v. Warden of Fleet, Salk. MSS.

If a man escape in *Essex*, and be seen at large in *Hertfordshire*, the plaintiff may lay his action in *Hertfordshire*. Walker and Griffiths, M. 25 G. 2.

If the defendant plead no escape, he cannot give in evidence no arrest; for he admits an arrest by his plea.

If the prisoner being out on bail come and surrender himsel, entering *reddidit se* in discharge of his bail on the judge's book, and the plaintiff's attorney accept him in execution, and file a *committitur*, and the prisoner escape, the marshal is not chargeable without notice, either by serving him with a rule, or entering a *committitur* also in his book, without proving the party actually in prison. Salk. 272.

If a sheriff, by colour of an *habeas corpus*, suffer the prisoner to go at large, it is an escape:—So it is, according to *Fitz. Jefferies*'s case, 1 *Sid.* 13. if the prisoner being in execution be brought upon an *habeas corpus ad testificandum*. However this does not seem a point intirely settled: About the 11 of *G.* 2. all the judges met, and seven inclined against allowing the writ, and five for it; but they came to no fixed resolution; and in fact, such an *habeas corpus* is frequently granted. 3 Co. 44.

According to a MSS. report of *Mosedell*'s case, *E.* 26 *Car.* 2. The court of *K. B.* held, that if a judge of that court granted such an *habeas corpus* for a prisoner in execution in the *Marshalsea*, it would be a good justification for the marshall, because the prisoners there are under the government of the court of *K. B.* But Lord Ch. Just. *Hales* doubted if such an *ha. cor.* were granted by another court, than that to which the prisoner belonged. 1 M. 116. 3 Keb. 51. 305.

1 Str. 435. If the ſheriff arreſt the party on meſne proceſs, and he is reſcued in going to gaol, it will be a good excuſe for the ſheriff; but if he be once within the walls of the priſon, a reſcue from thence by any but common enemies, will be no excuſe. If a company of rebels break the priſon, and let out the priſoners, the ſheriff is anſwerable: So if the priſoner be reſcued in bringing him to a judge's chambers (or elſewhere) upon an *habeas corpus*.

Cr. J. 657. 13 Ed. 1. c. 11. Note; By an equitable conſtruction of *Weſt.* 2. and 1 *R.* 2. *c.* 12. an action of debt lies for an eſcape in execution; but if one have execution on a ſtatute of lands, goods, and body, and the priſoner eſcape, yet, becauſe the lands remain in execution, debt will not lie, but only an action on the caſe.

Fitzg. 296. And note, That it has been holden, that if the plaintiff in an action againſt an hundred being nonſuited, and judgment entered for the coſts, the party be taken in execution on a *ca. ſa.* and eſcape, the hundred may bring debt againſt the ſheriff for the eſcape.

By 8 & 9 *W.* 3. *c.* 26. *ſ.* 8. If the keeper of any priſon, after one day's notice in writing, refuſe to ſhew any priſoner committed in execution, to the creditor or his attorney, ſuch refuſal ſhall be deemed an eſcape, *ſ.* 9. And if any perſon deſiring to charge another with any action or execution, ſhall deſire to be informed by the keeper of the priſon, whether ſuch perſon be a priſoner or not, the keeper ſhall give a true note in writing thereof to ſuch perſon upon demand at his office for that purpoſe, and ſuch note ſhall be ſufficient evidence that ſuch perſon was at that time a priſoner in actual cuſtody. And in ſuch caſe delivering the writ to the ſheriff will be ſufficient to charge the priſoner with the action, and to ſubject the ſheriff in caſe of an eſcape.

3 Co. 71. Where a new ſheriff is appointed, his predeceſſor ought to deliver over all the priſoners in his cuſtody, charged with their reſpective executions; and if he omit any, it is an eſcape; but if a ſheriff die, the new one muſt at his peril take notice of all perſons in cuſtody, and of the ſeveral executions with which they are charged.

And by 3 *G.* 1. The under-ſheriff is anſwerable till a new ſheriff is appointed.

Note; That an assignment of prisoners by an under-sheriff to the succeeding high sheriff, (though not by indenture) is a good assignment. 1 Barnes 259.

If a man in execution escape, and return again, and afterward be made over with other prisoners, and then make a second escape, the second sheriff shall be chargeable. 2 Lev. 109.

In an action on the case against the warden of the *Fleet*, it appeared in evidence that the plaintiff knew of the escape, yet proceeded in his action to judgment, but had not charged the defendant (who had returned to the gaol) in execution, and on a case made it was holden, that the plaintiff had not by such proceedings waved his right of action against the warden. Ravenscroft v. Eyles, 6 G. 3. C. B.

If a writ come to the sheriff, and he make out his mandate to the bailiff of a liberty, who takes the party, and afterwards suffers him to escape; the action lies against the bailiff, and not against the sheriff. Noy 27.

It will not be improper here to take notice, that if he who is in execution escape (though it be with the consent of the gaoler or sheriff), yet the plaintiff may retake him, and that after a twelvemonth, without a *sci. fa.* for he is in upon the first execution. And this even though he have brought an action against the gaoler or sheriff and recovered, *if the sum recovered were less than the debt*; as where the judgment was for 2000*l.* and the damages recovered were only 1000*l.* Lenthal and Gardiner, Hil. 26 & 27 Car. 2. per Hale. Colloo and Brandley, Tr. 31 Car. 2. K. B. Thes. Brev. 282.

In the case in *Thes. Brev.* 282. the whole debt was recovered against the sheriff; but the defendant pleaded to the *sci. fa.* that the plaintiff had taken a less sum of the sheriffs in satisfaction of the several sums of money and judgment aforesaid, and on demurrer, that plea was held to be bad. I suppose on the stale ground that a less sum could not be a satisfaction of a greater.

This action being founded in *maleficio*, and given by the statute, is not within the statute of limitations. 1 Lev. 191. 1 Saund. 34. 1 Sid. 305.

For misbehaviour in a trust or duty, an action on the case will likewise lie; for whosoever undertakes to do a thing for another ought to do it faithfully, else he is answerable for the damages arising from his negligence or misbehaviour: therefore if a man deliver goods to a common carrier to carry, and the carrier lose them, an action on the case will lie against him; but if there appear to be no default in the defendant, the plaintiff shall be nonsuited; as if an action were brought against a carrier for negligently driving his cart, so that a pipe of wine burst and was lost, it would be good evidence for the defendant, that the wine was upon the ferment, and when the pipe burst he was driving gently. Farrar v. Adams, P. 10 Ann. per Parker at G. Hall, Salk. MSS.

So where the defendant's hoy coming through bridge, by a sudden gust of wind was drove against the bridge and sunk, Amies and Stevens, Mic. 5 Geo. 1 Oct. Stra. 45. Stra. 128.

 Pratt

Pratt Ch. Juſt. held the defendant not liable; the damage being occaſioned by the act of God, which no care of the defendant could foreſee or prevent: and as to the evidence given by the plaintiff, that if the hoy had been better it would not have ſunk with the ſtroke received, the Ch. Juſt. ſaid, no carrier was obliged to have a new carriage for every journey; it is ſufficient if he provide one which without any extraordinary accident (ſuch as this was) will probably perform the journey. But nothing is an excuſe except the act of God and the king's enemies, and therefore in an action againſt ſuch a carrier, where the goods were ſpoiled by water, the defendant proving, that when the goods were put on board, the ſhip was tight, and that the hole through which the water came had been made by a rat eating out the oakum, was holden to be no excuſe.

Dale v. Hall, Mic. 24 G. 2.

If I ſend my ſervant with the goods on board the veſſel, and they are loſt, the carrier is not liable; for they are to be conſidered not in the poſſeſſion of the carrier but of the ſervant.

E. I. Comp. v. Pullen, H. 12 G. 1. Oct. Str. 132. 2 Show. 327.

If a carrier having convenience to carry goods, being offered his hire refuſe to carry them, an action will lie againſt him.

Salk. 282.

Note; All perſons carrying goods for hire, come under the denomination of common carriers: but if the driver of a ſtage coach, which only carries paſſengers for hire, loſe the goods of his paſſengers, the maſter is not liable; for no maſter is chargeable with the act of his ſervant, but when he acts in execution of the authority given him by his maſter; and then the act of the ſervant is the act of his maſter; and in ſuch caſe the action may be brought againſt either the maſter or the ſervant; and as the action may be brought againſt either the maſter or the ſervant, ſo either may bring *aſſumpſit* for the money for the carriage.

Note; In the caſe in *Salk.* it is holden, that if the action be brought againſt the maſters, it muſt be brought againſt them all; and if brought againſt one only, advantage may be taken of it on evidence. But according to later determinations, that matter can only be pleaded in abatement.

Rice v. Shute B. R. Eaſt. 10 G. 3.

If the carrier aſk what is in the box, and is told ſilk; yet in truth if there be money, he ſhall be anſwerable for it if loſt, unleſs he made ſpecial acceptance; but this intended cheat upon the carrier will be a good reaſon for the jury to give leſs damages.

Drinkwater v. Quennel, Tr. 11 & 12 G. 2. C. B. Aileyn 93. ſed vide poſt.

If

If a bag sealed be delivered to a carrier, and said to contain 200*l.* and the carrier give a receipt for so much, when in fact it contains 400*l.* if the carrier be robbed, he shall be answerable only for 200*l.* for his reward extends no further, and it is that makes him liable. Carth. 485.

An action was brought against the proprietors of a stage-coach, for not safely carrying 100*l.* delivered to their book-keeper in a bag, from *B.* to *L.* and on the trial it appeared that the money was put into a bag, and carried by the plaintiff's servant to the defendant's house, and there delivered to their book-keeper who asked no questions about the contents of the bag, but took it as a common parcel, and was paid for it as such by the servant, who gave him no information about it; the money was lost; and the servant, on his cross examination on the trial swore that he received no particular instructions from his master about the carriage, but only to deliver the parcel to the book-keeper, and pay what was demanded of him for the carriage: the defendants proved that an advertisement had been put into the country news-paper once every month for two years together, concerning the carriage of parcels by this stage-coach, with a N. B. at the bottom of it, that the proprietors would not be answerable for any money, plate, jewels, writings or other valuable goods, unless they were entered as such, and paid for accordingly; and that this paper was taken in at the house where the plaintiff lodged, who was frequently seen with it in his hand, and appeared to be reading it: the court of K. B. held that the defendants were not liable to answer for this money: for a carrier is only liable in respect of the reward, which he receives: and in the present case there was a clear fraud committed by the plaintiffs. And *per Yates* J. here is a full proof of a special acceptance, and a deceit on the part of the plaintiffs: for it is not necessary that there should be a personal communication in order to make a special acceptance. The reason of a personal communication is that each party may know the other's mind; and therefore if they know each others mind in any other manner, that is sufficient. Gibbons v. Payton and another, East. 9 G. 3.

If a common carrier be robbed, yet he is answerable; for nothing will excuse him but the act of God, or of the king's enemies; but he who has a particular employment (as a bailiff Coggs and Bernard, Raym.

bailiff or factor) though he have a reward, yet he is not bound againſt all events, if he do to the beſt of his power.

And it is to be known that there are ſix ſorts of bailments which lay a care and obligation on the party to whom goods are bailed, and which conſequently ſubject him to an action, if he miſbehave in the truſt repoſed in him.

2 Str. 1099. S. P.

1. A bare and naked bailment to keep for the uſe of the bailor, which is called *depoſitum*, and ſuch bailee is not chargeable for a common neglect, but it muſt be a groſs one to make him liable.

2. A delivery of goods which are uſeful to keep, and they are to be returned again in ſpecie, which is called *accommodatum*, which is a lending *gratis*; and in ſuch caſe the borrower is ſtrictly bound to keep them: for if he be guilty of the leaſt neglect, he ſhall be anſwerable, but he ſhall not be charged where there is no default in him.

3. A delivery of goods for hire, which is called *locatio* or *conductio*, and the hirer is to take all imaginable care, and to reſtore them at the time; which care if he ſo uſe he ſhall not be bound.

4. A delivery by way of pledge, which is called *vadium*; and in ſuch goods the pawnee has a ſpecial property; and if the goods will be the worſe for uſing, the pawnee muſt not uſe them; otherwiſe he may uſe them at his peril; as jewels pawned to a lady, if ſhe keep them in a bag and they are ſtolen, ſhe ſhall not be charged; but if ſhe go with them to a play and they are ſtolen, ſhe ſhall be anſwerable. So if the pawnee be at a charge in keeping them he may uſe them for his reaſonable charge; and if notwithſtanding all his diligence he loſe the pledge, yet he ſhall recover the debt. But if he loſe it after the money tendered, he ſhall be chargeable, for he is a wrong-doer: after money paid (and tender and refuſal is the ſame) it ceaſes to be a pledge, and therefore the pawnor may either bring an action of *aſſumpſit*, and declare that the defendant promiſed to return the goods upon requeſt; or trover, the property being veſted in him by the tender.

Manby v. Weſtbrooke, 19 G. 2. K. B.

Yelv. 178.

5. A delivery of goods to be carried for a reward, of which enough has been already ſaid; only I will here add, that the plaintiff ought to prove the defendant uſed to carry goods, and that the goods were delivered to him or his ſervant to be carried. And if a price be alledged in the declaration it ought to be proved the uſual price for ſuch a ſtage; and if the price be proved, there

Per Holt 13 W. 3. at Horſham.

there need no proof, the defendant being a common carrier; but there need not be a proof of a price certain.

6. A delivery of goods to do ſome act about them (as to carry) without a reward, which is called by *Bracton*, *mandatum*, in *Engliſh*, an acting by commiſſion; and though he be to have nothing for his pains, yet if there were any neglect in him, he will be anſwerable, for his having undertaken a truſt is a ſufficient conſideration; but if the goods be miſuſed by a third perſon in the way without any neglect of his, he would not be liable, being to have no award.

If the goods of a gueſt be ſtolen out of an inn the innkeeper is anſwerable; but the plaintiff muſt prove that the defendant kept a common inn, and that he, his ſon or ſervant, was a gueſt at the time, and that the goods were brought within the inn, and remained under the care of the defendant. Cr. J. 224.

If a man come to the inn with an horſe, and leave the horſe there for ſeveral days, and in his abſence his horſe be ſtolen, the owner is a ſufficient gueſt to maintain an action; but it would be otherwiſe if he had left a trunk or other dead thing, by which the innkeeper would have no gain. If he deſire the hoſt to put his horſe to graſs, and the horſe be ſtolen, the innkeeper is not liable; for by law he is only bound to anſwer for thoſe things that are *infra hoſpitium*: So if the innkeeper refuſe to receive him becauſe his houſe is full, where he ſays he will ſhift, and then is robbed, the hoſt ſhall not be charged; but without ſuch cauſe he cannot diſcharge himſelf by words only. Salk. 388. Cr. J. 188. 8 Co. 32. 1 And. 29. Moor 78.

In *Yielding* v. *Fay*, *Cr. El.* 569. It was holden, that where by cuſtom the parſon ought to keep a bull and a boar, every inhabitant who hath prejudice by his not keeping them may have an action, and that Not Guilty is no good plea to ſuch an action, upon this diſtinction that it is a good plea to an action for a misfeaſance, *aliter* to an action for non-feaſance; for they are two negatives, which cannot make an iſſue any more than two affirmatives.

And note, That in all caſes where a damage accrues to another by the negligence, ignorance or miſbehaviour of a perſon in the duty of his trade or calling, an action on the caſe will lie; as if a farrier kill my horſe by bad medicines, or refuſe to ſhew him, or prick him in the ſhoeing, &c. &c. But it is otherwiſe where the law lays no duty upon him; as if a man find garments, and by negligent keeping they be ſpoiled. Cr. El. 219.

CHAPTER VII.

Of Case for Consequential Damages.

AN action upon the case will likewise lie for consequential damages where the act itself is not an injury.

1 R. A. 105. c. 11.

As if a man who ought to inclose against my land, do not inclose, by which the cattle of his tenants enter into my land and do damage to me. So, till 6 *Ann. c.* 31. (which enacts that no action shall be had against any person in whose house or chamber any fire shall accidentally begin, for any damage occasioned thereby, with a proviso that it shall not extend to defeat or make void any contract or agreement between landlord and tenant) if a fire broke out in the house of *B.* which burnt the house of *A. A.* might bring an action.

Salk. 19.

Ib.

It has been holden that if a lessee for years under a contract to be answerable for fire, lease to *B.* at will without such covenant, yet he may have an action against his under-lessee because he is answerable over: and this is not within the act: *Tamen quære,* for he had it in his own power to make him covenant to be careful.

Latch. 153. Poph. 166.

A right of way may be extinguished by unity of possession, unless it be a necessary one, and then it shall not. But a right of water-course does not seem to be extinguished by unity of possession in any case.

11 H. 4. 5. 21 Ed. 3. 2. 2 Sheph. Abr. 156.

If *A.* have Black Acre and *C.* have White Acre, and *A.* has a way over White Acre to Black Acre, and then purchases White Acre, the way will be extinct; and if *A.* afterwards enfeoff *C.* of White Acre without accepting the road, it is gone.

Cro. Jac. 170. 189, 190. Co. Lit. 155.

J. had four closes of land together, and sold three of them, reserving the middle close, to which he had no way but through that which he sold; and it was holden that though he did not reserve the way, yet it should be reserved for him.

1 R. A. 391. pl. 3. 1 Mod. 190.

If a man has a way by prescription over *A.*'s ground to Black Acre, he can't by virtue of this drive his cattle over *A.*'s ground into Black Acre, and so into other places beyond Black Acre.

Keymer v. Summers, Hereford Sum. Assizes, 1769.

In an action for obstructing a way, the plaintiff proved that *Fowler* was seised of the plaintiff's tenement and the defendant's close, and in 1753 conveyed the tenement to the plaintiff with all ways therewith used, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from *Fowler* for three lives, made in

1723.

1723, by which *Fowler* demised the field in question in an ample manner as one *Rock* a former tenant held it; and in this lease there was no exception of a way over the close. *Yates*, J. held that by the lease without any reservation *the way was gone*, and therefore could not pass under the words *all ways* &c. But as there were thirty years intervening between the defendant's lease, and the plaintiff's conveyance, and the way had been used all the time, that was sufficient to afford a presumption of a grant or licence from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass. Sed Q. & vide Finche 63.

In an action for diverting a water-course, the defendant pleaded that he was seised of two closes through which, *&c.* and that he and all those, *&c.* had used to water their cattle in the said water; and for the conveniency of watering to dig a ditch near the said water-course, *&c.* and the court held that one prescription cannot be pleaded against another without a traverse; but if upon the general issue it had been proved, that the water was usually drunk up by the cattle of the defendant, the plaintiff would have failed in his prescription. Murgatroid and Law, Carth. 117. Brown and Best, 20 G. 2.

If a man have an ancient house, and another build so near as to darken his windows, he may have an action upon the case. So if a man build a new house on part of his land, and afterwards sell the house to another, neither the vendor, nor any other claiming under him, may stop the lights: But if he sell the vacant ground to another, and keep the house without reserving the benefit of the lights, the vendee may build. 9 Co. 58. 1 Lev. 22.

If *A.* recover damage against *B.* for stopping his lights, and afterward *B.* assign the lands in which the nusance was erected, *A.* may bring another action against *B.* for the continuance of the nusance, for before the assignment *B.* was answerable for all the consequential damages, and it shall not be in his power to discharge himself by granting it over: Yet *A.* may bring the action against the assignee. Though formerly a distinction was taken, *viz.* where the continuance occasions a new nusance, and where the first erection has done all the mischief; that in the first case the assignee is liable to an action, but not in the second. Roswell and Prior, Ca. K. B. 635. Rippon and Bowles, Cr. J. 373.

All these cases go upon this principle, that every man should so use his own as not to damnify another. But if a new school be set up in a town, where an ancient school has been time out of mind, by which the old school receives damage, yet no action lies, and this is founded upon public convenience, and comes within the description of *damnum sine injuria*. 1 R. A. 107.

But

Bliffet and Hart. Mich. 18 G. 2. C. B.

But a man poffeffed of an acient ferry may bring an action againft one who fets up a new ferry near to it: for if it be an ancient ferry, he is compellable to keep boats, &c.

If the king grant a patent for the fole ufe of a new invention, and the patent is good in law, an action lies againft any perfon who infringes upon it; but the invention muft be new, and muft be fully and fairly difcovered.

By 21 *Jac.* 1. *c.* 3. which declares all monopolies illegal, it is enacted in *f.* 6. that that act fhall not extend to any letters patent and grants of privilege for 14 *years* or under, thereafter to be made of the fole working or making of any manner of *new* manufactures within this realm to the true and *firft inventor* of fuch manufactures, which others at the time of making fuch letters patent fhall not ufe, fo as alfo they be not contrary to law, nor mifchievous to the ftate by raifing the prices of commodities at home, or hurt of trade, or generally inconvenient.

Salk. 447. 1 Hawk. 233.

A manufacture newly brought into the kingdom from beyond fea, though not new there, is within this exception: and whether learned by travel or by ftudy it is the fame thing.

3 Inft. 184. 1 Hawk. 233.

No new invention concerning the working of any manufacture is within this exception, unlefs it be fubftantially new, and not barely an additional improvement of an old one.

Ib.

No old manufacture in ufe before can be prohibited by the grants of the fole ufe of a new invention.

Rex v. Muffary, Mich. 12 G. 2.

Refpecting patents the following general rules were laid down by *Lee* C. J. 1ft: Every falfe recital in a thing not material will not vitiate the grant, if the king's intention is manifeft and apparent.

2d. If the king is not deceived in his grant by the falfe fuggeftion of the party, but from his own miftake upon the furmife and information of the party, it fhall not vitiate or avoid the grant.

3d. Although the king is miftaken in point of law or matter of fact, if that is not part of the confideration of the grant, it will not avoid it.

4th. Where the king grants *ex certa fcientia et mero motu*, thofe words occafion the grant to be taken in the moft liberal and beneficial fenfe according to the king's intent and meaning expreffed in his grant.

5th. Although in fome cafes the general words of a grant may be qualified by the recital, yet if the king's intent is plainly

plainly expressed in the body of the grant, the intent shall prevail and take place.

A writ of *scire facias* to repeal letters patent lies in three cases; 1st, When the king doth grant by several letters patent one and the self same thing to several persons, the first patentee shall have a *sci. fa.* to repeal the 2d. 2dly, when the king doth grant a thing upon a false suggestion, he *prærogativa regis*, may by *sci. fa.* repeal his own grant. 3dly, when the king doth grant any thing which by law he cannot grant. 4 Inst. 88.

Where a patent is granted to the prejudice of a subject, the king of right is to permit him upon his petition to use his name for the repeal of it. 2 Vent. 344.

A grant of the sole making of playing cards is void, because it is to restrain trade and traffick. 8 Co. 125. 11 Co. 84.

When upon false insinuations or pretences, the king makes any grant, as of a monopoly, &c. which in truth is to the prejudice of the king and the commonwealth, the king *jure regis* shall avoid such grant, and such letters patent by judgment of law shall be cancelled. And it may be said that perpetuities, monopolies, and patents of concealment, were born under an unfortunate constellation, for as soon as they have been brought in question, judgment has always been given against them, and none at any time given for them; and all of them have two inseparable qualities, viz. to be troublesome and fruitless. 10 Co. 113. b.

There are three inseparable incidents to every monopoly against the commonwealth. 1st, the price of the commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases. 2dly, The commodity is not so good. 2dly, It tends to the impoverishment of artificers. 11 Co. 86. b.

The genetal questions on patents are, 1st, Whether the invention were known and in use before the patent. 2d, Whether the specification is sufficient to enable others to make it up. The meaning of the specification is, that others may be taught to do the thing for which the patent is granted; and if the specification is false, the patent is void; for the meaning of the specification is, that after the term the Public shall have the benefit of the discovery. Liardet against Johnson, sittings at Westminster after Hil. 1778. cor. Ld. Mansfield.

"In a patent for trusses for ruptures, the patentee omitted what was very material for tempering steel, which was rubbing it with tallow, and for want of that, Lord *Mansfield* held it void. Ib.

"Inventions are of various kinds, some depend on the result of figuring, others on mechanism, &c. others depend on no reason, no theory, but a lucky discovery: water tabbies were discovered by a man's spitting on the floor. This must in the nature of the thing depend on experiments, and Ib.

and thoſe muſt depend on the proportions of the things uſed in the compoſition."

In *Morris* v. *Branſon*, ſittings at *Weſtminſter* after *Eaſter* 1776. The queſtion was whether an addition to an old ſtocking frame was the ſubject of a patent? Lord *Mansfield* ſaid, if the general queſtion of law, viz. that there can be no patent for an addition be with defendant that is open upon the record, and he may move in arreſt of judgment, but that objection would go to repeal almoſt every patent that was ever granted. There was a verdict for plaintiff and 500 *l.* damages, which was acquieſced in.

The king againſt Arkwright, ſittings at Weſtminſter after Tr. 1785.

On a *ſcire facias* to repeal a patent, four iſſues were joined on the record. 1ſt, That the patent was inconvenient to his majeſty's ſubjects in general. 2dly, That the invention at the time of granting the patent was not a new invention as to the public uſe and exerciſe of it in *England*. 3dly, That it was not invented and found out by defendant. 4thly, That the defendant had not by his ſpecification particularly deſcribed and aſcertained the nature of the invention, and in what manner it was to be performed.

Buller, J. held that the 1ſt iſſue was merely a conſequential one, it ſtated no fact which could be tried by a jury, or which the defendant could come prepared to anſwer, and therefore refuſed to hear any evidence but what applied to the three laſt iſſues; and he laid down the following rules.

1ſt, A man to intitle himſelf to the benefit of a patent of monopoly muſt diſcloſe his ſecret and ſpecify his invention in ſuch a way that others of the ſame trade who are artiſts may be taught to do the thing for which the patent is granted, by following the directions of the ſpecification without any new invention or addition of their own.

2dly, He muſt ſo deſcribe it that the Public may after the expiration of the term have the uſe of the invention in as cheap and beneficial a way as the patentee himſelf uſes it: and therefore if the ſpecification deſcribes many parts of an inſtrument or machine, and the patentee himſelf uſes only a few of them; or does not ſtate how they are to be put together or uſed, the patent is void.

3dly, If the ſpecification be in any part of it materially falſe or defective, the patent is againſt law and cannot be ſupported.

4th, That as to the invention, the rule of law was very different from what it was on the ſpecification: for as on the ſpecification if any one part of the invention were not ſufficiently deſcribed, the patent is void; ſo on the invention, if any one part of it be new and uſeful, that is ſufficient to ſuſtain a patent for the particular object of the invention: but if the invention conſiſts of an addition or improve-

improvement only, and the patent goes to the whole machine, it would be a very different question, whether such a patent could be supported. But it was not necessary to give a precise opinion on that point, because no material part of the invention was new, or made by the defendant. The jury found for the crown on all the issues.

The patent must not be more extensive than the invention; therefore if the invention consist in an addition or improvement only, and the patent is for the whole machine or manufacture, it is void. Per Ld. Mansfield in different cases and by Buller J. in the king v. Else sittings at Westminster after Mic. 1785.

In an action on the case by a commoner for disturbing him in his common, he must prove his right to the common, and yet in such case it is not necessary to set it forth in the declaration, for possession is sufficient against a wrong-doer. But if he were to set up a title to a different kind of common from that to which he had a right, he would not be intitled to recover; for he must prove himself possessed of the common, for the being disturbed in which he brings his action, though he need not prove the same title as he has set out in his declaration; for the disturbance is the gist of the action, and the title is only inducement, and cannot be traversed. It is true if the defendant set up a title, and justify, the plaintiff in his replication must shew a title. 4 Mod. 424. Cr. E. 335. 419. 4 M. 424.

For every feeding by the cattle of a stranger, the commoner shall not have an action; but the feeding ought to be such *per quod* the commoner, *&c.* common of pasture, *&c.* for his cattle, *&c. in tam amplo modo habere non potuit, sed proficuum suum inde per totum tempus amisit, &c.* So that if the trespass be so small that he has not any loss, but sufficient in ample manner remain for him, the commoner shall not have any action for it; but the tenant of the land may in such case have an action. 9 Co. 113.

It has been said that in case for disturbing the plaintiff in the seat of a church, the plaintiff ought to prove usage to repair, though it be not alledged in the declaration. But the true distinction seems to be between prohibitions or actions against the ordinary, and actions against a wrong-doer. Where it is to oust the ordinary of his jurisdiction you must prove repairs; but it is not necessary to prove them in an action against a wrong-doer, which is founded upon possession. 1 Sid. 263. Kendrick and Taylor, Tr. 26 G. 2. K. B.

If case be brought for disturbing the plaintiff in taking the profits of an office, it is sufficient to prove the value *communibus annis*, without proving every particular sum received by the defendant. 2 Vent. 171.

In case for disturbing him in an office, the plaintiff made a special title to it; a special verdict found a title *variant* in part from that which was alledged; and after divers arguments the plaintiff had judgment, for setting out a title in this action was superfluous. Cr. E. 335.

Dy. 236. An action upon the cafe will lie for keeping a dog ufed to bite fheep, and which has killed fheep belonging to the plaintiff; but in fuch cafe it muft be proved that the defendant knew that he would bite fheep; and killing fheep twice before is fufficient proof of ufage.

Stra. 1264. In *Smith* and *Pelah*, *Lee* Ch. Juft. ruled, That if a dog have once bit a man, and the owner having notice thereof keep the dog and let him go about, and he bite another perfon, cafe will lie againft him at the fuit of the perfon bit (though it happened by his treading on the dog's toes); for the owner ought to have hanged him on the firft notice.

1 Raym. 110. Ca. K. B. 335. If one knowingly keep a dog accuftomed to bite fheep, and the dog bite an horfe, it is actionable; becaufe the owner after notice of the firft mifchief ought to have deftroyed or hindered him from doing any more.

2 Raym. 1583. Note; There is a difference between things *feræ naturæ*, as lions, bears, *&c.* which a man muft keep up at his peril, and beafts that are *manfuetæ naturæ*, and break through the tamenefs of their nature; in the latter cafe the owner muft have notice; in the former an action lies againft the owner without notice.

1 Raym. 739. The fervant of *A.* with his cart ran againft the cart of *B.* in which was a pipe of fack, and overturned it, and the wine was fpilt, an action was brought againft the mafter, and it was holden good. And note, where fuch an action is brought againft the mafter for confequential damages occafioned by the neglect of his fervant, the fervant charged with the neglect cannot be a witnefs to prove it no neglect. But in an action for fo negligently managing his barge that he run down the plaintiff's, *Lee* Ch. Juft. permitted the defendant to produce every one of the men on board his veffel to prove there was no neglect, he being himfelf at that time afleep on board. And in cafe againft the mafter, for his carman's negligently driving his cart, *per quod* the plaintiff was flung off a ladder and bruifed; on fhewing a releafe from the mafter, the fervant was allowed to be examined.

H. 10 An. per Holt, Salk. MSS.

G. Hall, 1744.

2 Str. 1083.

Cr. J. 158. In cafe for digging a pit in a common, *per quod* his mare being ftraying there fell into it and perifhed: After verdict for the defendant on Not Guilty, the plaintiff, to fave cofts, moved in arreft of judgment that the declaration was not good, he not fhewing any right why his mare fhould be in the common, and therefore it is *damnum abfque injuriâ*, and of that

that opinion was the whole court: Wherefore it was adjudged that the bill should abate. Yet it seems unjust in such case to deprive the defendant of his costs, merely because the action brought against him was erroneous as well as wrongful: Though doubtless the objection to the declaration was good, and ought to have availed in case the verdict had been for the plaintiff. It is a good reason why the plaintiff should not have judgment; but seems to be no reason why the defendant should not.

If a man dig a ditch in the highway, into which my servant falls and breaks his thigh, by which I lose his service, I may have an action on the case for this loss of service. So for beating him by which I lose his service; and in such case the servant may be a witness. And the defendant may give in evidence upon the general issue, that the plaintiff did not lose his service, for that is the gist of the action. But if the servant die of the battery, the master cannot have an action for the lose of his service, for the private offence is drowned in the felony; and the defendant might give this in evidence on the general issue; for as this action arises from the special damages, any thing may be given in evidence on the general issue that destroys the right of action; as in case for beating his horse, *per quod* he totally lost the use of him, the defendant may prove the beating lawful.

1 R. A. 88.

Duel and Harding, 9 G. 1. per Raym.

10 Co. 133. 1 Vent. 54. Yelv. 89.

Str. 872.

The plaintiff declared that he exercised the trade of a wheeler, and was possessed of several tools that related to the trade, *viz.* an axe, *&c.* and being so possessed gained a livelihood, *&c.* and by the licence of the defendant deposited them in his house, and that he had detained them two months after request, by which the plaintiff had lost the benefit of his trade; after verdict it was moved in arrest of judgment, because the plaintiff ought to have brought detinue or trover. But the court held the action well brought, for if he have had the goods again, detinue is not proper; and though a detainer upon request is evidence of a conversion, yet it is not a conversion, and the damages he demands in this case being special, the action ought to be special.

Kettle and Hunt, Mic. 27 Car. 2. C. B.

The plaintiff declared that his wife unlawfully and without his consent departed and continued absent, and during that time a large estate real and personal was devised for her separate use, and thereupon she was desirous of being reconciled and cohabiting with him, but the defendant

Winsmore and Greenbank, Mic. 19 G. 2. C. B.

dant persuaded and inticed her to continue absent, by means of which she continued absent till her death, whereby he lost the comfort and society of his wife, and the advantage which he ought to have had from such real and personal estate. After verdict for the plaintiff for 3000 *l.* damages, it was moved in arrest of judgment, that this was an action *primæ impressionis.* But the court said that every special action on the case was in itself a novelty; no action lies without damages, and the *per quod* will not alone be sufficient, unless the act done be illicit; but though a bare inticement to depart may not be actionable, yet the jury under the direction of the judge are judges of the legality: And as receiving a servant *scienter* is a ground for an action for the master, *a fortiori* for the husband; and injuries, that are in their nature of spiritual conusance, if attended with a temporal damage, are a ground of action.

2 Lev. 63. 2 Saund. 169. 2 Sid. 170. Vidian's Entr. 85.

So shooting off a gun, *per quod* the plaintiff's decoy was damaged, was holden to be actionable in *Hickeringal*'s case. *Hil.* 5 *An.*

It is impossible to set down all the cases in which an action upon the case will lie for consequential damages: I shall therefore conclude this head with referring to the fifth chapter of the first book, and repeating the rule already taken notice of in that chapter, *viz.* Where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, &c. trespass *vi et armis* will lie; but where the act itself is not an injury, but a consequence of that act is prejudicial to the plaintiff's person, house, lands, &c. trespass *vi et armis* will not lie: but the proper remedy is an action upon the case. The case of *Pitts* v. *Gaince* and *Foresight* may serve to illustrate this rule. There the plaintiff declared in an action upon the case, for that he was master of a ship, and that it was laden with corn ready to sail, and that the defendant seized the ship and detained her, *per quod impeditus fuit in viagio.* It was objected that it should have been trespass, and some cases cited; but *Holt* Ch. Just. said, that in the cases cited the plaintiff had a property in the thing taken, but here the ship was not the master's but the owner's; the master only declares as a particular officer, and can only recover for his particular loss; though he said he might have brought trespass, declaring upon his possession, which in trespass is sufficient.

2 Str. 635. S. P.

Salk. 10.

BOOK III.

For what Injuries affecting a Man's real Property, an Action may be maintained.

INTRODUCTION.

THE actions, which may be brought for injuries affecting a man's real property are of three sorts,

1. Such in which damages alone are to be recovered.
2. Such by which a term for years may be recovered.
3. Such by which a freehold may be recovered.

The actions in which damages alone are to be recovered are two.

1. Trespass.
2. Case; of which enough has been already said in the last chapter of the last book.

The only action by which a term for years may be recovered, is ejectment.

The actions by which a freehold may be recovered, are,

1. A writ of right.
2. A formedon.
3. Dower.
4. Waste.
5. Assize.
6. Quare impedit.

CHAPTER I.

Of Trefpafs.

THE action of trefpafs lies for an injury done by one private man to another, where the immediate act itfelf occafions the injury either to his perfon, goods, or lands; and though in this place I ought regularly to treat only of the laft, yet (as I before promifed) I fhall likewife take into my confideration the fecond, having already fpoken of the firft as far as is neceffary.

The fix Carpenters cafe, 8 Co.

Where entry, authority or licence is given to any one by the law, and he does abufe it, he will be a trefpaffer *ab initio*; but where it is given by the party, he may be punifhed for the abufe, but he will not be a trefpaffer *ab initio*. But the not doing cannot make the party, who has authority or licence by the law, a trefpaffer *ab initio*, becaufe not doing is no trefpafs.

Cr. J. 147.

In trefpafs for taking a gelding, the defendant juftified the taking of him as an eftray, the plaintiff replied that he laboured the faid gelding, riding upon him and drawing with him, whereby he was much damnified; the defendant demurred, and it was objected that the firft feizure was lawful by the plaintiff's own fhewing, and therefore the action fhould not have been brought for the taking, but for the fubfequent tort: but the court held that he was punifhable for the abufe in an action of trefpafs, as a trefpaffer *ab initio*, and that the ufing of the eftray was an abufer; for it is not lawful, except in cafe of neceffity, and for the benefit of the owner; as to milk milch kine, &c.

Salk. 122. Gargrave and Smith.

In trefpafs for taking away his goods, the defendant juftified the taking *nomine diftrictionis* damage feafant; the plaintiff replied *quod poft diftrictionem, viz. eodem die, &c.* he converted them to his own ufe. On demurrer it was holden to be no departure, but to make good the declaration, for he that abufes a diftrefs is a trefpaffer *ab initio*; and it would be of no avail to the plaintiff to ftate the converfion in his declaration, for it is no way neceffary to his action; and if alledged, need not be anfwered: It would be out of time to ftate it in the declaration, but it muft come in in the replication.

Sir Ralf Bovey's cafe, 1 Ventr. 217.

But

But in treſpaſs for breaking and entering his houſe, and taking an exceſſive diſtreſs, after judgment by default, it was holden on error brought that treſpaſs would not lie; for the entry was lawful, and there is nothing ſubſequent to make it a treſpaſs, as there is where the diſtreſs is abuſed. At common law the party might take a diſtreſs of more value than the rent, therefore that did not make him a treſpaſſer *ab initio*, but the remedy ought to be by ſpecial action founded upon the ſtatute of *Marleberge*. Str. 851. Hutchings and Chamber, M. 31 G. 2. S. P. Burr. 590.

And note, That in diſtreſs for rent, if the outward door be open, the diſtrainant may juſtify the breaking open an inner door or lock, in order to find any goods which are diſtrainable. Browning and Dann. 9 G. 2.

By 2 *W. & M. ſeſſ.* 1. *c.* 5. Where goods are diſtrained for rent reſerved, and the tenant or owner of the goods ſo diſtrained ſhall not within five days next after ſuch *diſtreſs* taken, and *notice* thereof (with the cauſe of ſuch taking) left at the chief manſion houſe, or other moſt notorious place on the premiſes, replevy the ſame with ſufficient ſurety to the ſheriff, then *after* ſuch diſtreſs and notice, and expiration of the ſaid five days, the perſon diſtraining ſhall and may with the ſheriff, under-ſheriff, or with the conſtable of the hundred, pariſh or place where ſuch diſtreſs ſhall be taken, cauſe the goods to be *appraiſed* by *two ſworn appraiſers* (whom ſuch ſheriff, under-ſheriff or conſtable are impowered to ſwear) to appraiſe the ſame truly according to the beſt of their underſtandings, and after ſuch appraiſement may *ſell* the ſame for the beſt price that can be gotten, towards ſatisfaction of the rent and the charges leaving the *overplus* (if any) in the hands of the ſheriff, under-ſheriff or conſtable, for the owner's uſe.

Notice to the tenant or to the owner of the goods is ſufficient. 4 Mod. 395.

A diſtreſs taken in two hundreds, they being contiguous at the ſame time and for the ſame rent, is but one diſtreſs, and ought to be put in one pound, and the conſtable of the place where the diſtreſs was driven is the proper officer within the ſtatute. Ib.

If the perſon diſtraining is ſworn as one of the appraiſers it is illegal, for he is intereſted in the buſineſs, and the ſtatute ſays that *he*, with the ſheriff, *&c.* ſhall cauſe the goods to be appraiſed by two ſworn appraiſers. Andrews againſt Ruſſel and another, Sittings at Weſtminſter, after Eaſt. 1786.

By the ſame ſtatute *ſ.* 5. if diſtreſs and ſale are made where no rent is due, the owner of the goods by action of treſpaſs or on the caſe may recover double the value of the goods diſtrained and ſold, with full coſts.

Sect. 3. Corn, grain and hay may be diſtrained, and ſhall be kept in the place where they are found till they are replevied or ſold.

By 11 *Geo.* 2. *c.* 19. *ſ.* 8. The landlord may diſtrain any cattle or ſtock of the tenants feeding on any common appendant or appurtenant, *&c.* and all ſorts of corn, graſs or other product growing on any part of the eſtate, and may cut and make the ſame, and lay it up in barns or other proper place on the premiſes when ripe; and if none ſuch, then in any other barn or proper place which the landlord, *&c.* ſhall hire for the purpoſe, and as near as may be to the premiſes, and in convenient time to appraiſe, ſell or otherwiſe diſpoſe of the ſame towards ſatisfaction of the rent, and of the charges, appraiſement and ſale: and the appraiſement to be made when cut, gathered and made, and not before.

Sect. 9. Notice of the place where the goods are depoſited ſhall within a week, be given to the leſſee or tenant, or left at his laſt place of abode, if the rent and charges be paid before the corn, *&c.* is cut, the diſtreſs ſhall ceaſe.

Sect. 10. Diſtreſſes may be ſecured and ſold on the premiſes, in ſuch place or on ſuch part as may be moſt fit and convenient.

By 11 *Geo.* 2. *c.* 19. A diſtreſs for rent ſhall not be deemed unlawful for any irregularity in the diſpoſition of it afterward, nor the party making it a treſpaſſer *ab initio:* but the party aggrieved may recover full ſatisfaction for the ſpecial damage he ſhall have ſuſtained thereby, and no more, in an action of treſpaſs or on the caſe, unleſs tender of amends have been before made.

By 17 *Geo.* 2. *c.* 38. Where any diſtreſs is made for money juſtly due for the relief of the poor, it ſhall not be deemed unlawful, nor the party making it a treſpaſſer, on account of any defect or want of form in the warrant of appointment of ſuch overſeers or in the rate or aſſeſſments, or in the warrant of diſtreſs thereupon; nor ſhall the party be deemed a treſpaſſer *ab initio* on account of any irregularity which ſhall afterward be done by him; but the party grieved may recover for the ſpecial damage, unleſs tender of amends have been before made.

Charlwood and Beſt, Weſtminſter 1748.

Note; A warrant may be made to diſtrain before the time for which the rate is made is expired.

Hutchins v. Chamber & al' Mic. 31 G. 2. K. B.

It hath been determined that *averia carrucæ* may be diſtrained for the poor's rate, though there be ſufficient goods on the premiſes independent of them; and the law ſeems to be the ſame in all caſes where an act of parliament gives remedy by diſtreſs and ſale. And though where a man has an entire duty, he ſhall not ſplit and diſtrain for diſtinct parts at ſeveral times, yet if he be miſtaken in the ſufficiency of what he has taken, there is no reaſon or law that he ſhould not diſtrain again for the reſidue.

Vide 17 Car. 2, c. 7. ſ. 4.

Hardr. 480, 10 Co. 76.

Where the ſubject-matter of the ſuit is within the juriſdiction of the court, but the want of juriſdiction is as to the perſon or place,

place, unless the want of jurisdiction appear on the process to the officer who executes it, he is not a trespasser: but where the subject matter is not within the jurisdiction, there every thing done is absolutly void, and the officer a trespasser.

Though an officer may justify under the mesne process of an inferior court, without saying that the cause of action arose within the jurisdiction, yet when he justifies under process of execution he ought to make it appear that the cause arose within the jurisdiction of the court, or at least that it was so laid: But that would not be sufficient for the plaintiff himself; he ought to know the extent of the jurisdiction for which he applies for justice; and therefore if in an action of false imprisonment he justified under the process of an inferior court the plaintiff above might reply that the cause of action arose out of the jurisdiction of the court; and a rejoinder praying judgment if the plaintiff, having by his pleading in the inferior court admitted the jurisdiction there, shall now be admitted to deny it here, would not be good. Higginson v. Martin and Hadley, M. 28 Car. 2. Rot. 416.

But by 24 *G.* 2. (*quod vide ante*) no constable will be answerable for obeying a justice's warrant, notwithstanding any defect of jurisdiction in the justice.

Note; That warrant *ex vi termini* means only an authority; therefore a warrant under the hand of the justice is sufficient without being under seal, unless particularly required by act of parliament. Padfield and Cabbel & al'. Tr. 16 and 17 Geo. 2. C. B.

And *note*, That by 27 *G.* 2. *c.* 20. in all cases where any justice is impowered, by any act made or to be made, to issue a warrant of distress, it shall be lawful for him in such warrant to order the goods distrained to be sold within a certain time limited by such warrant, so that such time be not less than four, nor more than eight days, unless the money for which such distress shall be made, together with the charges of taking and keeping such distress, be sooner paid.

Proof that the plaintiff had delivered a box with the goods in it to the defendant to keep, and that the defendant had broken open the box and converted the goods to his own use, would be sufficient to maintain the declaration; for wherever a man has neither a general nor a special property, and he converts the goods, trespass will lie. Moor 248.

But the plaintiff can only prove the taking ſuch goods as are mentioned in the declaration; becauſe a recovery in the action could not be pleaded in bar to any other action brought for taking other goods than thoſe ſpecified in the declaration; and therefore where the declaration was for entering the plaintiff's houſe, and taking *diverſa bona et catalla ipſius querentis ibidem inventa*, after verdict for the plaintiff judgment was arreſted.

1 Str. 637.

After judgment vacated, and reſtitution awarded, the defendant brought treſpaſs againſt the plaintiff for taking the goods, and the court held that the action would lie; for by vacating the judgment it is as if it had never been, and is not like a judgment reverſed by error. But in ſuch caſe it would not lie againſt the ſheriff, who has the king's writ to warrant him; but the party muſt produce not only the writ but the judgment.

1 Lev. 95.

In treſpaſs *quare clauſum fregit* the defendant pleaded, that the plaintiff diſtrained his hog, damage feaſant for the ſame treſpaſs; the plaintiff replied, that the hog eſcaped without his conſent, and that he is not ſatisfied for the damage; on demurrer it was holden that the action would not lie, though it was admitted that if the diſtreſs had died, the action would revive; but the eſcape (unleſs the contrary be ſhewed) is the fault of the plaintiff.

Salk. 248.

Treſpaſs *vi et armis* does not lie againſt a leſſee for years for cutting down timber trees, and carrying them away and ſelling them; but if after cutting them down he let them lie, and afterward carry them away, ſo that the taking and carrying away be not one continued act, but there is time for the property of the divided chattel to ſettle in the leſſor, treſpaſs will lie: And the reaſon why he is not otherwiſe liable is, that he has a ſpecial property or intereſt in them for repairs and ſhade; and therefore if the trees be excepted in the leaſe, it will make him a treſpaſſer equally with a leſſee at will, and it will lie againſt tenant at will, becauſe ſuch acts determine the will; but againſt a tenant by ſufferance the leſſor cannot have treſpaſs before entrance. And though a treſpaſs will lie againſt the leſſee for years for cutting the trees where they are excepted in the leaſe, yet if he put in his cattle to feed, and they bark the trees, treſpaſs will not lie.

Aleyn 82.

Herlakenden's caſe, 4 Co. Moor 248. Ante 81.

Co. Lit. 57.

1 Raym. 739.

Note; if land be leaſed to *A.* for a year, and ſo from year to year as long as both parties ſhall agree, this is a leaſe for two years

Salk. 414.

years certain; and if the lessee hold on after two years, he is not a lessee at will (as the old opinion was) but for a year certain, for his holding on is an agreement to the original contract; and such an executory contract is not void by the statute of frauds, for there is no term for above two years ever subsisting at the same time: but if the original contract were only for a year, or if it were at 8 *l. per annum* rent without mentioning any time certain, it would be a tenancy at will after the expiration of the year, unless there were some evidence, by a regular payment of rent annually or half yearly, that the intent of the parties was that he should be tenant for a year.

1 Raym. 208.

Goodtitle ex dem. Hucks v. Langford, per Foster, J. on a case reserved from Berks, 1753.

By 6 *Ann. c.* 18. Guardians, trustees, husbands seised in right of their wives, and tenants *pur autre vie*, holding over without consent are made trespassers, but the act does not extend to lessees for years.

If the lord of a manor cut down so many trees as not to leave sufficient estovers, his copyholder may bring trespass against him, and recover the value of the trees in damages; and if the lord leave sufficient estovers, yet he shall recover special damages; *viz.* for the loss of his umbrage, breaking his close, *&c.* therefore if the lord have a mind to cut trees, he ought to compound with his tenant.

Ca. K. B. 379.

If *A.* make a lease for years excepting the trees, the lessor may enter to shew the trees to a purchaser, and the lessee cannot bring trespass.

Lifford's Case, 11 Co. 46.

Note; if *A.* plant a tree upon the extremest limits of his land, and the tree growing extends its root into the land of *B. A.* and *B.* are tenants in common of the tree; but if all the roots grow in *A.*'s land, though the boughs shadow the land of *B.* yet the property of the whole is in *A.*

1 Raym. 737.

It is not necessary to have an interest in the soil, to maintain trespass *quare clausum fregit*, but an interest in the profits is sufficient, as he who has *prima tonsura.* So if *J. S.* agree with the owner of the soil to plow and sow the ground, and for that to give him half the crop, *J. S.* may have his action for treading down the corn, and the owner is not jointly concerned in the growing corn, but is to have half after it is reaped by way of rent, which may be of other things than money: Though in *Co. Lit.* 142. it is said it cannot be of the profits themselves; but that (as it seems) must be understood of the natural profits.

Welch and Hall, per Powell at Wells, 1700. Salk. MSS.

The

Co. L. 283. The plaintiff may prove trefpafs at any time before the action brought, though it be before or after the day laid in the declaration. Per Holt, 4 An. at Hertford. But in trefpafs with a *continuando* the plaintiff ought to confine himfelf to the time in the declaration; yet he may waive the *continuando*, and prove a trefpafs on any day before the action brought, or he may give in evidence only part of the time in the *continuando*. 4 M. 253. et vide Str. 1095.

1 Salk. 639. Note; That of acts that terminate in themfelves, and once done cannot be done again, there can be no *continuando*; as hunting or killing a hare, or five hares, but that ought to be alledged, that *diverfis diebus ac vicibus* between fuch a day and fuch a day he killed five hares, and cut and carried away twenty trees. And where a trefpafs is laid in continuance that cannot be continued, exception ought to be taken at the trial, for he ought to recover but for one trefpafs. But hunting may be continued as well as fpoiling and confuming grafs.

Raym. 240. Whether the trefpafs may be laid with a *continuando* or not, depends much upon the confideration of good fenfe, as where trefpafs is brought for breaking a houfe or hedge, it may well be laid with a *continuando*, for that pulling away every brick or ftick is a breach; but if the declaration be that the defendant threw down twenty perches of hedge *continuando tranfgreffionem prædictam* from fuch a day to fuch a day, this muft be intended of a profternation done at the firft day, and therefore will be ill upon demurrer, or judgment by default, but will be aided by verdict, becaufe the court will intend that the jury gave no damage for the *continuando*.

Ibid. So trefpafs cannot be laid of loofe chattels with a *continuando*, and if it be fo laid, no evidence can be given but of the taking at one day, and therefore in trefpafs for mefne procefs it ought to be laid *diverfis diebus ac vicibus*. Salk. 639. Where feveral trefpaffes are laid in one declaration, *continuando tranfgreffiones prædictas*, and fome of them may be laid with a *continuando*, and fome not, after verdict, the *continuando* fhall be extended only to the trefpaffes which may be laid with a *continuando*. So where Ca. K. B. 24. the *continuando* is impoffible, the court will intend no damages were given for it.

Lifford's cafe 11 Co. 51. If my diffeifor cut down the trees, grafs or corn growing upon my land, and afterward I re-enter, I may have an action of trefpafs againft him, for after my regrefs the law fuppofes the freehold always continued in me; but if my diffeifor make a

feoffment

feoffment in fee, or a lease for years, and afterwards I enter, a may not have trespass against those who came in by title, for those fictions of law shall not have relation to make him who comes in by title a wrong-doer *vi et armis*.

So the law is laid down by Lord *Coke*, but it may admit of doubt, for there are cases to the contrary, and the reason of the law seems to be with them. Cr. El. 540. Mo. 461.

In trespass against the tenant in possession for mesne profits, either by the lessor or the nominal plaintiff, after a recovery in ejectment, the plaintiff need not prove a title; but it is sufficient to produce the judgment in ejectment, and the writ of possession executed, and to prove the value of the profits, and thereupon he shall recover from the time of the demise laid in the declaration. Astlin and Parkin, Mic. 32 G. 2. per omnes Justic. on a case reserved.

Where the judgment was against the tenant in possession, and the action of trespass is brought against him, it seems sufficient to produce the judgment without proving the writ of possession executed, because by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry; but where the judgment was against the casual ejector, and so no rule entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed. Thorp and Fry, Oct. Str. 5.

In case the plaintiff can prove his title accrued before the time of the demise, and prove the defendant to have been longer in possession, he shall recover antecedent profits; but in such case the defendant will be at liberty to controvert the title, which he cannot do in case the plaintiff do not go for more time than is contained in the demise; because being tenant in possession he must have been served with the declaration, and therefore the record is against him conclusive evidence of the title; but against a precedent occupier the record is no evidence, and therefore against such a one it is necessary for the plaintiff to prove his title, and also to prove an actual entry; for trespass being a possessory action cannot be maintained without it. But it may admit of doubt what proof of an actual entry is sufficient: it has been said that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and therefore if a man make his will and Decosta and Atkins, per Eyre Ch. J. Hil. 4 G. 2. Stanynought and Cosins. 2 Barnes 367.

 die,

2 R. A. Tit. Trespass per Relation.

die, the devisee will not be entitled to the profits till he has made an actual entry. Others have holden that when once he has made an actual entry, that would have relation to the time his title accrued, so as to entitle him to recover the mesne profits from that time, and they rely on the case in *Sid.* 239. which was trespass brought for the mesne profits, *devant le* lease, and nothing said in the case about proving an actual entry antecedent to it: they say too, that if the law were not so, the courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means intitle themselves to recover profits which they would not otherwise be intitled unto. However supposing a subsequent entry has relation to the time the plaintiff's title accrued, yet certainly the defendant may plead the statute of limitations, and by that mean protect himself from all but the six last years.

But another question might be put, which would perhaps occasion more difficulty, *viz.* Suppose the defendant were to plead the former recovery in the ejectment in bar, how must the plaintiff reply? It seems certain that the plaintiff may recover the whole mesne profits in the ejectment, and that is apparent from the 16 & 17 *Car.* 2. which enacts, that in case the judgment be affirmed on the writ of error, the court may award a writ of enquiry as well of the mesne profits, as of the damages by any waste committed after the first judgment. Perhaps it may be answered, that the court will take notice that the proceedings in ejectment are merely fictitious, and only to enable the plaintiff to get possession, and that it is never usual to recover more than small damages for the ouster, without any consideration had of the mesne profits. And it is certain the courts do frequently take that into consideration; otherwise the lessor would not be intitled to recover at all for the time laid in the declaration, since by his own shewing, his lessee and not himself was entitled to the action. But if the plaintiff were, upon the judgment in ejectment being affirmed on error, to have a writ of enquiry, it would probably (if rightly pleaded) prevent his recovering any thing in a subsequent action of trespass: and therefore if the demise were laid any time back, it would be adviseable for the plaintiff in ejectment to take (as he may) judgment for his costs on the writ of error, without having any writ of enquiry. Note; in case the action be brought after a judgment by

Doe v. Roache, E. 11 G. 2. K.B. Astlyn and Perkin.

by default againſt the caſual ejector, it is uſual for the plaintiff to recover the coſts of the ejectment, as well as the meſne profits. In caſe the action be brought by the nominal plaintiff in ejectment, the court will upon application ſtay the ſuit till ſecurity is given for anſwering the coſts. Agreed ibid.

If in treſpaſs *quare clauſum fregit* the plaintiff ſet out the abuttals of his cloſe, he muſt on the evidence prove every part of his abutment; as if the abuttal be laid *a parte Auſtrali* to the mill of *A.* he muſt prove a mill there, and that it was in the tenure of *A.* but it will be ſufficient though there be an highway between them. So if the abuttal be aſſigned towards the Eaſt, though it be North, if it incline to the Eaſt it is ſufficient. If the plaintiff count of a treſpaſs in one acre ſetting forth its abuttals, and he prove a treſpaſs in any part of that acre ſo abutted, the jury may find the defendant guilty as to that part. 2 R. A. 677, 678. Yelv. 114.

Many things may be laid in aggravation of damages, of which alone treſpaſs would not lie; as treſpaſs may be brought for entering the plaintiff's houſe, and beating his wife, child, or ſervant; but in ſuch caſe the plaintiff cannot recover damages for loſing the ſervice of his child or ſervant, becauſe he may have a proper action for that purpoſe, nor can that be given in evidence; but the beating may be given in evidence to aggravate the damages; for now (though it has been holden otherwiſe formerly) if the principal matter will bear an action, you may give any thing in evidence in aggravation of damages, *i. e.* any thing that will not of itſelf bear an action; for if it will, it muſt be ſhewn, as in treſpaſs *quare clauſum fregit*, the plaintiff would not be permitted to give evidence of the defendant's taking away a horſe, *&c.* But in treſpaſs *quare clauſum et domum fregit*, he may give in evidence that the defendant came into his houſe and defiled his daughter. Salk. 642. Str. 61. 1 Sid. 225.

Where the action is tranſitory (as treſpaſs for taking goods) the plaintiff is forecloſed to pretend a right to the place, nor can it be conteſted upon the evidence who had the right; therefore poſſeſſion is juſtification enough for the defendant, and it is ſufficient for him to plead that he was poſſeſſed of *Blackacre*, and that he took the goods damage feaſant without ſhewing any title. But it is otherwiſe in treſpaſs *quare clauſam fregit*, becauſe there the plaintiff claims the cloſe and the right may be conteſted. Salk. 643.

Riley and Parkhurſt, Tr. 22 G. 2. Treſpaſs for taking and detaining his cattle at *Teddington*; the defendant juſtified taking them damage feaſant at *Kingſton*, and that he carried them to *Teddington* and impounded them there. It was objected on demurrer that the juſtification was local, and therefore the defendant ought to have traverſed the place in the declaration; *ſed non allocatur*, for when the defendant ſays he carried them to *Teddington*, and impounded them there, they agree in the place; for if the defendant had not a right to take them, he was a treſpaſſer at *Teddington*.

2 R. A. 676, 677. In treſpaſs *quare clauſum fregit*, the defendant may upon not guilty give in evidence that he had a leaſe for years (but not that he had a leaſe at will, for that is like a licence which may be countermanded at pleaſure), or that this ſervant put the cattle there without his aſſent; but he cannot give in evidence a right of common, or to a way, or any other eaſement; nor can the defendant give in evidence that the plaintiff ought to repair his fences, for want whereof the cattle eſcaped; nor that he entered to take his emblements or cattle; nor that he entered in aid of an officer for execution of proceſs, or in freſh purſuit of a felon, or to remove a nuiſance, nor that it was the freehold of *A.* and that he entered by his command or licence, for theſe are all matters of juſtification only. [Br. General Iſſue, 82. 1 Raym. 732. Co. L. 283. 5 Co. 85. Br. General Iſſue, 81.]

1 Ray. 725. See Ball v. Herbert, Hil. 29 G. 3. cont. (Note; every man of common right may juſtify the going of his ſervant or horſes upon the banks of navigable rivers, for towing barges, &c. and if the water impair the banks, they ſhall have reaſonable way in the neareſt part of the next field.)

Hatton and Neal, per Jones Ch. J. 1683. Upon not guilty in treſpaſs the defendant gave in evidence articles, by which Sir *Robert Hatton* (under whom the plaintiff claimed as heir) ſold the defendant 300 of the beſt trees in ſuch a wood, to be taken between ſuch a time and ſuch a time. Sir *Robert* died, and the defendant within the time took the trees; upon which the plaintiff proved Sir *Robert* was only tenant in tail, but this was a voluntary ſettlement of his own; and the judge held clearly that this ſale, being proved to be for a valuable conſideration, bound the heir in tail, being within the 27 *El. c.* 4. and beſides the ſettlement was with a power of revocation; and the plaintiff was nonſuited.

Co. L. 233. March 31. Salk. 151. The defendant cannot give in evidence, that the goods were ſeized as a heriot, or that they were diſtrained damage feaſant, &c. But in treſpaſs for taking goods from the plaintiff's wife, he

he may give in evidence that they were taken after a decree for alimony (for that is a separate maintenance, and not in the power of the husband.) But he cannot give in evidence, that the plaintiff had no property, for possession is sufficient to maintain trespass. So he may give in evidence, or plead that he is tenant in common with the plaintiff: but if he would take advantage of a stranger being so, he must plead it in abatement, for that will not prove him not guilty. Salk. 4. Ante 34.

So if there be two defendants, they may plead a tenancy in common in one of them with the plaintiff. Salk. 4.

If trespass be brought by an executor against an executor *de son tort*, he may give in evidence payment of debts to the value in mitigation of damages; but yet there shall be a verdict against him, for he is nevertheless a trespasser. Ca. K. B. 441.

If trespass be brought against a sheriff, who has levied goods by virtue of a *fi. fa.* against the plaintiff, he need not shew the judgment. But if the goods were the goods of *J. S.* and the plaintiff claim them by a prior execution (or sale) that was fraudulent, the sheriff must shew a copy of the judgment. 1 Raym. 733.

Note; A *fi. fa.* is *de bonis et catallis debitoris*, and therefore the debtor's goods only can be taken in execution: but the *lev. fa.* is *de exitibus terræ*, and therefore the cattle of a stranger levant and couchant may be taken, for they are issues; but the cattle of another tenant in common cannot, for he has done nothing but what he might do; but then his title must be found by the inquisition, for otherwise he is bound till he avoid it by a *monstrans de droit*. The *fi. fa.* first delivered to the sheriff ought to be first executed; but if he execute the second first, the execution is good, and the party can only have his remedy against the sheriff. Note; At common law the goods were bound from the teste of the writ, but by 29 *Car.* they are bound only from the delivery of the writ to the sheriff. Salk. 395. Salk. 220.

Per Hardwicke C. Neither before the statutes of frauds nor since, is the property of the goods altered, but continues in the defendant, till execution executed. The meaning of the words, "That the goods shall be bound from the delivery of "the writ to the sheriff," is that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution. Lowthal v. Tomkins, 2 Eq. Ca. Abr. 381.

Note;

Note; By 21 *Jac.* 1. The defendant may to a trespass *quare clausum fregit*, plead a disclaimer, and that the trespass was by negligence or involuntary, and tender of sufficient amends before the action brought; whereupon, or upon some of them, the plaintiff shall be enforced to join issue.

Lambert v. Strother, M. 14 G. 2. C. B. 6 Mod. 117.

If in trespass *quare clausum fregit* a man declare generally in such a vill, the defendant may plead *liberum tenementum*, and if the plaintiff traverse it, it is at his peril; for the defendant, if he have any part of the land in the whole town, shall justify it there; and therefore the better way is for the plaintiff to make a new assignment. Yet *Q.* how can he make a new assignment unless the defendant in his plea give a name certain to the *locus in quo?* And therefore in *Dy.* 23. *c.* 147. it is said that if the defendant say, that the *locus in quo* is six acres in *D.* which are his freehold, and the plaintiff say they are his freehold, and in truth the plaintiff and defendant have both six acres there, the defendant cannot give in evidence, that he did the trespass in his own soil, unless he give a name certain to the six acres, for otherwise (says the book) the plaintiff cannot make a new assignment. And it is certain that where the action is transitory (as for taking the plaintiff's goods) the defendant, if he would plead the *locus in quo* to be his freehold, and that he took the goods damage feasant, he must ascertain the place at his peril; because by his plea he has made that local which was at large before; for the taking of the goods is the gist of the action, and therefore the plaintiff may prove it at a different place than that laid in the declaration.

6 Mod. 117.

1 Lit. 148.

27 H. 8. 7.

In trespass the defendant justified in a place called *A.* as his freehold; the plaintiff by way of new assignment said that the place in which, &c. is called *B.* It is no plea to say that *A.* and *B.* are the same place; for by the new assignment the bar is at an end.

Cr. El. 492.

If the plaintiff make a new assignment, and the general issue be joined thereon, the plaintiff cannot prove the defendant guilty at the place mentioned in the bar; for when the plaintiff makes a new assignment, he waives that whereto the defendant pleaded in bar; so as in, truth if it be the same place, he can never take advantage thereof, and therefore if it be the same, yet the defendant ought not to rejoin that it is so, but plead not guilty, and take advantage of it at the trial.

As trespass is a possessory action, it is enough for the plaintiff in his replication to traverse the title set out by the defendant, without setting up a title in himself; for the possession admitted in the plea in giving colour is sufficient, unless the defendant can make out a title in himself. But if in trespass for taking a gelding, (or other chattel) the defendant plead that the place where is 100 acres, and that *J. S.* is seised thereof in fee, and that he as his servant and by his express orders took the gelding (or other chattel) damage feasant, the plaintiff cannot reply *de injuria sua propria absque tali causa*, for that would put in issue three or four things; but he must traverse one thing in particular.

Cary and Holt, 19 G. 2.

Cockerel and Armstrong, E. 11 G. 2. C. B.

Trespass by the lord of a manor for spoiling his peat, and digging holes: the defendant pleaded a right of common, and because the peats, *&c.* injured his right of common he removed them; to which the plaintiff replied *de injuria sua propria absque tali causa*; the plaintiff cannot on this issue give in evidence that there was a sufficiency of common left.

D'Ayrolles v. Howard, Bur. 1383.

The defendant pleaded a right of common for his cattle levant and couchant, and to another count a licence to cut down a tree to make a gate, and that he had applied it for that purpose. The plaintiff replied as to the first that they were not his own commonable cattle levant and couchant, and as to the second *protestando* that the tree was not applied, traversed the licence and concluded to the country. The defendant demurred specially to the first replication, because it was *multifarious*, and as to the other because it concluded to the country when it should have been with an averment. But the court held the first traverse good, for the rule is not that you must join issue on a single fact, but on a single point, which need not consist only of one fact.—A custom from the nature of it must have several: in this case the levancy and couchancy of his own commonable cattle make up this one point of right to the common. As to the second they held that by the denial of the licence, and admitting all the rest of the fact, the plaintiff put the substantial thing in issue, therefore ought to conclude to the country.

Rayley v. Robinson, M. 30 G. 2. K. B.

If the defendant plead that it is his freehold; the plaintiff may reply three ways, 1. That it is his freehold, and then he must always traverse the defendant's plea, except in one case, and

Lambert and Strother, M. 14 G. 2. C. B.

and that is where he makes a new aſſignment. 2. Or he may derive a title under the defendant, and then he muſt not deny its being the defendant's freehold. 3. He may ſet up a title not inconſiſtent with the defendant's; and then he may either traverſe the defendant's title, or not, as he pleaſes.

2 R. A. 684.

Cr. Car. 54.

Carth. 20.

Infra. S. P.

If the declaration be for taking away a ſtack of rye, the jury may find the defendant guilty as to five quarters parcel thereof, and not guilty as to the reſidue. So if the declaration be for cutting and taking away trees, the defendant may be found guilty of the taking, though not of the cutting. So if there be two defendants, the jury may find them ſeverally guilty as to part, and ſeverally not guilty as to the reſidue, and aſſeſs damages ſeverally; but if the jury were to find them guilty *de præmiſſis*, and then ſever the damages, it would be ill, for by finding them guilty *de præmiſſis*, they find them equally guilty, and then they canot ſever the damages, which is to find one more guilty than the other.

Tilly and Woody, 7 E. 4. 31. cited Hob. 54. 1 Lev. 63. S. P.

Treſpaſs againſt two for taking goods; the one pleaded not guilty, and verdict againſt him; the other pleaded the plaintiff had given him the goods, and verdict for him; and it was holden that the plaintiff ſhould not have judgment againſt the other, it being one action, and the court apprized that the title was againſt the plaintiff.

2 Str. 1140. Ante 14.

Treſpaſs againſt three for taking the plaintiff's goods, and for falſe impriſonment; judgment by default againſt one; not guilty pleaded by another; and a demurrer to the declaration by the third. At the trial of the general iſſue, there was likewiſe a writ to aſſeſs damages on the judgment by default, and contingent damages on the demurrer. The jury gave a verdict for the defendant on not guilty, and 100*l.* on the writ of enquiry as to one of the defendants, and 1 *s.* as to the other. And *Lee* Ch. J. was of opinion, that the jury might ſeparate the damages, the defendants not having pleaded jointly.

Hill and Winſey v. Goodchild, B. R. Tr. 11 G. 3.

But where the plaintiff declared againſt two for a joint treſpaſs, and the jury found them guilty in *manner and form* as the plaintiff complained againſt them, and aſſeſſed damages againſt *H.* 40 *s.* and 40 *s.* coſts, and againſt *W.* 1 *s.* and 1 *s.* coſts, and judgment was entered againſt *Hill* for 4 *l.* damages aſſeſſed by the jury, and 23 *l.* coſts *de incremento*, in the whole 27 *l.* and againſt *Winſey* for 1 *s.* damages and 1 *s.* coſts;

coſts; on error being brought for this cauſe, the court reverſed the judgment, ſaying that as there was a joint treſpaſs laid and found, the damages could not be ſevered.

CHAPTER III.

Of Ejectment.

THE ſecond ſort of action which may be brought for an injury affecting the real property of the party is an ejectment by which a term for years is to be recovered; and as this is almoſt the ſingle action now in uſe for the recovery of eſtates, (the perſon who claims the right bringing an ejectment in the name of a fictitious leſſee) it will be neceſſary to treat pretty largely upon his head.

The plaintiff who claims a title feigns a leaſe, and in the name of the fictitious leſſee delivers a declaration againſt the caſual ejector (who is alſo ſome feigned perſon) to the tenant in poſſeſſion; upon this declaration there is indorſed a notice to the tenant in poſſeſſion in the name of the caſual ejector, ſignifying that unleſs he appear and defend his title, he ſhall let judgment paſs by default. This ſervice may be on the tenant himſelf in any place off the premiſſes, but if it be on the wife or ſervant, it muſt be on the premiſſes; and if it be on the ſervant, there muſt be ſome acknowledgment by the tenant of having received it. By 11 *G.* 2. *c.* 19. the tenant muſt give notice to his landlord, of any declaration in ejectment, under the penalty of three years' rent, and the landlord may, by leave of the court, make himſelf defendant with the tenant in poſſeſſion, in caſe he appear; and in caſe ſuch tenant refuſe to appear, judgment ſhall be ſigned againſt the caſual ejector; but upon the landlord's entering into the like rule to confeſs as the tenant ought to have done, the court ſhall order a ſtay of execution upon ſuch judgment till further order.

Savage and Dent. H. 10 G. 2. K. B. Salk. 255.

In caſes of a vacant poſſeſſion, no perſon claiming title will be let in to defend, but he that can firſt ſeal a leaſe upon the premiſſes muſt obtain poſſeſſion.

Jones ex dem. Woodward and Williams, Tr. 13 G. 2. 1 Barnes 122.

 A mort-

White ex dem. Whatley v. Hawkins, Mich. 14 G. 3.

A mortgagee need not give notice to a tenant to quit before bringing his ejectment, if he mean only to get into the receipt of the rents and profits of the eſtate, though the mortgage be made ſubſequent to the tenant's leaſe. But in ſuch caſe he ſhall not be ſuffered to turn the tenant out of poſſeſſion by the execution. In the preſent caſe the leaſe was only from year to year, and, with reſpect to the laſt year, might be conſidered as a leaſe ſubſequent to the mortgage: but the court held it would have been the ſame, if the leaſe were for a long term.

Throgmorton v. Whelpdale, B. R. Hil. 9 G. 3.

If a tenant hold from year to year, the landlord cannot maintain an ejectment without giving ſix months previous notice, unleſs the tenant have attorned to ſome other perſon, or done ſome other act diſclaiming to hold as tenant to the landlord; and in that caſe no notice is neceſſary.

Dy. 173. in marg. 1 Ro. Abr. 661.

If *A.* be ſeiſed in fee, and a ſtranger enters by virtue of a leaſe for years which is void, and pays rent to *A.* *A.* can never proceed againſt him as a diſſeiſor; for the acceptance of rent is a full allowance of the leaſe he claims, and conſequently the entry by virtue of it is made rightful.

James ex dem. Aubrey v. Jenkins, C. B. Tr. 30 & 31 G. 2.

Tenant for life by leaſe and releaſe made a leaſe for life, tenant in tail when he came into poſſeſſion accepted rent, yet this is no confirmation, but the leaſe is abſolutely void on the death of tenant for life.

Roe ex dem. Crompton v. Minſhal, B. R. Eaſt. 33 G. 2.

In ejectment by a landlord againſt his tenant, on a proviſo for re-entry for a forfeiture, the whole court held that the leſſor bringing covenant for half a year's rent ſubſequent to the time of the demiſe laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then ſubſiſted. The law will always lean againſt forfeitures, as courts of equity relieve againſt them.

By 4 *G.* 2. *c.* 28. where the landlord or leſſor has right to re-enter for non-payment of rent, and no ſufficient diſtreſs is to be found on the premiſſes, he may, without any formal demand or re-entry, ſerve a declaration in ejectment, or in caſe the ſame cannot be legally ſerved, or no tenant be in actual poſſeſſion of the premiſſes, then affix the ſame upon the door of any demiſed meſſuage; or in caſe there be no meſſuage, then upon ſome notorious place of the lands.

A very

A very little matter is ſufficient to keep the poſſeſſion, Savage and Dent, Hil. 10 G. 2.
therefore where the defendant had left ſome beer in his cellar, the landlord proceeding as on a vacant poſſeſſion, the judgment and execution were ſet aſide with coſts.

By the ſame act, where an ejectment is brought againſt a N. B. The courts had done this antecedent to this act. Salk. 597.
tenant for non-payment of rent, the tenant may at any time before the trial pay into court the rent arrear and the coſts, and thereupon the proceedings ſhall be ſtayed.

In ejectment by a landlord, the tenant moved to ſtay pro- Pure ex dem. Withers & al' v. Sturdy, H. 1752.
ceedings upon payment of rent-arrear and coſts. On a rule to ſhew cauſe it was inſiſted for the plaintiff, that the caſe was not within the act, for that it was not an ejectment founded ſingly on the act, but that it was brought likewiſe on a clauſe of re-entry in the leaſe for not repairing, and the leaſe was produced in court; however, the rule was made abſolute, with liberty for the plaintiff to proceed upon any other title.

The perſon who ſwears to the ſervice muſt ſwear poſitively that ſuch a one is tenant in poſſeſſion, and that he read the indorſement to him, and acquainted him with the contents thereof: and upon this affidavit the plaintiff moves for judgment againſt the caſual ejector, which is granted unleſs the tenant enter into the common rule of confeſſing leaſe, entry and ouſter.

If there be ſeveral perſons who claim title, the rule may be drawn generally, or particularly: generally, as that *J. S.* who claims title to the premiſſes in queſtion in his poſſeſſion ſhould be admitted defendant for ſuch meſſuages; and this puts a neceſſity on the plaintiff to diſtinguiſh by proof what tenements are in each tenant's poſſeſſion, otherwiſe he can have no verdict. But if the rule be drawn ſpecially, that ſuperſedes the neceſſity of proof that the lands are in his poſſeſſion.

If the plaintiff after iſſue and before the trial enter into Yelv. 180. Cr. Car. 261.
part, the defendant may at the aſſizes plead this as a plea *puis darrein continuance* in bar to the plaintiff's action, but it is at the diſcretion of the juſtices, whether they will receive it; but if they do, it ſtops the trial, and the plaintiff is not to reply to it at the aſſizes, but the judge is to return it as parcel of the record of *Niſi Prius.*

Str. 1056. The plaintiff has a right to proceed both for the possession and the trespass, and therefore the death of the lessor (though only tenant for life) is no abatement; but if the plaintiff in such case insist to go on, the court will oblige him to give security for payment of the costs in case judgment go against him.

If on the trial the defendant will not appear, and confess lease, entry and ouster, the course is to call the defendant to confess, &c. and then to call the plaintiff and nonsuit him, and pray to have it indorsed on the *postea* that the nonsuit was for want of confessing, &c. and then upon the return of the *postea* judgment will be given against the casual ejector.

1 Raym. 729. Claxmore and Searle. If there be several defendants, and some of them do not appear and confess, according to the old method a verdict was to be taken for them, and the *postea* was indorsed that the verdict was for them because they did not confess. But it is said, *Salk.* 456. that by a rule made 4 *An. B. R.* the plaintiff shall go on against those who will confess, and shall be nonsuited as to those who will not; but the cause of the nonsuit shall be expressed on the record, and upon the return of the *postea*, the court being informed what lands were in the possession of those defendants, judgment shall be entered against the casual ejector as to them.

Ellis and Knowles, 1 Barnes 118. *N. B.* I can find no such rule in the printed book: and *E.* 7 *G.* 2. in *C. B.* upon the precedent of *Claxmore* and *Searle* and others, judgment was given on motion against the casual ejector, as to such of the defendants as were acquitted at the trial for not confessing, as appeared by an indorsement on the *postea*; and this seems the right way.

If there be several tenants in possession, the plaintiff must deliver a declaration to each of them.

Where the house is empty it is necessary to seal a lease on the land, and give rules to plead, and when they are out, upon affidavit of the whole matter, the court grants judgment.

Carth. 390. Where a corporation aggregate is lessor of the plaintiff, they must give a letter of attorney to some person to enter and seal a lease upon the land, and therefore the plaintiff ought in such case to declare upon a demise by deed, (for they cannot enter and demise upon the land, as natural persons can) though this will be aided after verdict.

Mich. 9 G. 2. Dormer and Fortescue. If a material witness for the defendant be also made a defendant, the right way is for him to let judgment go by default; but if

if he plead, and by that mean admit himself tenant in possession, the court will not afterwards upon motion strike out his name. But in such case if he consent to let a verdict be given against him for as much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant.

If an ejectment be brought for a church, the curate may move for a special rule to defend only *quoad* a special right of entry to perform divine service. So it is said in *Salk*. 256. But in *Martin* and *Davis*, the court denied to let the parson of *Hampstead* chapel defend only for a right to enter and perform divine service, saying the case in *Salk*. has been often denied. Str. 914.

An ejectment lies for part of a highway, and though it be built upon, it shall be demanded as land. Chester (ex dem.) v. Alker B. R. Hil. 30 G. 2. Burr.

An ejectment will lie for nothing of which the sheriff cannot deliver execution: therefore it will not lie for a rent, common, or other thing lying in grant, *quæ neque tangi nec videri possunt*; but it will lie for common appendant or appurtenant, for the sheriff by giving possession of the land gives possession of the common; so it will likewise lie for tithe by the 32 *H*. 8. *c*. 7. where they are appropriated; but in such case the demise must be set forth to be by deed, though after a verdict this would be aided; it must likewise shew the nature of the tithe. Str. 54. Carth. 390. 11 Co. 23. Raym. 136.

Whatever creates a discontinuance is a bar to an ejectment; as if tenant in tail make a feoffment, or levy a fine to another in fee, the issue cannot bring ejectment as he may if his ancestor alien by lease and release without warranty. If tenant in tail, remainder to *B*. in tail, bargain and sell to *C*. and his heirs and afterwards levy a fine with proclamations to *C*. and his heirs, who enfeoffs *D*. tenant in tail dying without issue, the remainder-man may bring ejectment, for the fine levied to the bargainee makes no discontinuance of the remainder, no estate of freehold passing by it; but if it had been levied before the bargain and sale inrolled, or if the bargain and sale had been expresly made to declare the use of the fine, so that both must have been considered as one conveyance, it had been otherwise; and the feoffment of the conusee is no discontinuance of the remainder, for none can discontinue the remainder or reversion, but he only to whom the land is intailed, and none can discontinue an estate tail, unless he discontinue the reversion of him who has the reversion, or remainder if any hath the re- Co. L. 337. Ed. Seymour's case, 10 Co. 95. Odyern v. Whitehead, Tr. 32 G. 2. K. B. Co. L. 335.

mainder, &c. Therefore if a donee in tail, reversion in the donor, infeoff the donor, it is no discontinuance. So if before 34 *H.* 8. *c.* 20. the reversion were in the king, the tenant in tail could not discontinue the estate tail, though he might have barred it by a common recovery. And note, That it is a maxim, that a grant by deed of such things as lie in grant works no discontinuance.—So a fine *sur* grant and render, or *sur* conusance *de droit tantum*.—It is likewise a maxim, that none can make a discontinuance but he who is seised of the estate tail in possession; and therefore if tenant for life and he in remainder in tail make a feoffment by deed, it is no discontinuance. So likewise if they levy a fine.—If tenant in tail make a lease for the life of the lessee, it is a discontinuance; and so it is though the remainder man join in the lease. A tenant for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to *B.* husband and wife levied a fine with warranty, and died *sans* issue, *B.* brought ejectment, and it was holden that the fine was no discontinuance, and consequently the warranty no bar. And note, No discontinuance lasts longer than the wrongful estate created by it, therefore where tenant in tail levied a fine to *B.* for life, and after levied a second fine for the use of himself in fee, and then bargained and sold to *J. S.* it was holden the first fine made a discontinuance only for the life of *B.* Secondly, the second fine did not enlarge the discontinuance, because the estate returned back to the conusor. Thirdly, if the second fine had been levied to a stranger, yet during the life of the first conusee it had been no discontinuance.

Co. L. 331. Co. L. 333. 1 P. A. 632. Cr. E. 828. 1 Co. 76. Co. Litt 302. Ibid. 326. Cr. Car. 405. 1 Lev. 36. Co. L. 333.

By 32 *H.* 8. *c.* 28. No fine, feoffment or other act, made, suffered or done by the husband only, of any manors, &c. being the inheritance or freehold of the wife, during the coverture shall make a discontinuance thereof.—A feoffment by husband and wife is within this act. So where during the coverture lands are given to the husband and wife, and the heirs of their two bodies. But in that case if the husband levy a fine with proclamations it will bar the issue, and if five years pass after his death without any entry or claim by the wife, her entry will be taken away and her right extinguished. If land be given to the husband and wife, and the heirs of the body of the husband, and the husband make a feoffment in fee, this is a discontinuance if he survive his wife, but not otherwise.

Co. L. 326. 8 Co. 72. Cr. Car. 320.

By

By 11 *H.* 7. *c.* 20. If any woman having an estate in dower, or for life or tail, jointly with her husband or wholly to herself or to her use, of the inheritance or purchase of the husband, or given to the husband or the wife in tail or for life, by any ancestor of the husband's or other person seised to the use of the husband or his ancestors, being sole or with other after-taken husband, discontinue, alien, release or confirm with warranty, or by covin suffer a recovery, all such recoveries, discontinuances, *&c.* are void, and every person to whom the interest should belong after the death of the woman, may enter as if no discontinuance had been; and if such husband and wife make such discontinuance the person to whom the manors, *&c.* should belong after the death of the woman, may enter and hold according to such title as he should have had if the woman had been dead, and there had been no discontinuance, as against the husband during his life, provided that the woman after the death of the husband may re-enter. But if sole when the discontinuance is made, she shall be barred for ever, and the person to whom the interest belongs may enter.

If a husband devise to his wife in tail, remainder to *B.* in fee, and the wife with a second husband levy a fine to *J. S.* the son by the second husband cannot enter; for though it is within the words, it is not within the intent of the act. 1 Leon. 261.

It is within the act, though the gift by the husband or his ancestors, by which the wife takes, were made as well in consideration of money paid by the feme or her father, as of the marriage. But it is otherwise if the land be settled by the ancestor of the wife in consideration of the marriage, and of money paid by the husband; for it shall be intended, that her advancement was the principal cause of the gift. But if conveyed by a stranger in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the baron, it is within the act. Cr. J. 474. Cr. J. 624. Moor 250.

If the issue in special tail, remainder to him in fee, levy a fine, and after his mother being tenant in tail within this act lease for three lives, (not warranted by 32 *H.* 8.) living the issue, the conusee may enter. But if the reversion in fee had been in another, the conusee could not enter, because he would take only by estoppel; nor the heir because he has concluded himself by the fine; nor his issue who is likewise barred. But if the wife tenant in tail suffer a recovery, and the issue Sir George Brown's case, 3 Co. 51. Cr. J. 175. 3 Co. 61.

issue in tail release to the recoveror, the issue of that issue is not barred thereby.

By 21 *Jac.* 1. *c.* 16. None shall make an entry into land, but within twenty years after their right or title shall first descend or accrue to them, with the usual saving for infants, feme coverts, &c. Therefore if the lessor of the plaintiff be not able to prove himself or his ancestors to have been in possession within 20 years before the action brought, he shall be nonsuited.

Ca. K. B. 573.

If a declaration in ejectment be delivered within 20 years, and a trial had, whereby there is lease, entry and ouster confessed; yet if the plaintiff being nonsuited in that action bring another after 20 years, that will not be proof of an entry, to bring it out of the statute of limitations, for that must be an actual entry.

Ford and Grey, Salk. 285. Page and Selfby, per Weston J. in Suffex 1680. Salk. MSS. Co. L. 242. b.

Note; the possession of one joint-tenant or parcener is the possession of another. So if the defendant were to prove that the sister of the plaintiff had enjoyed the estate above 20 years, and that he entered as heir to her; the court would not regard it, because her possession would be construed to be by curtesy, and not to make a disherison, but by licence to preserve the possession of the brother, and not to be within the intent of the statute. But perhaps it would be within the statute, if the brother had ever been in the actual possession and ousted by his sister, for then her entry could not possibly be construed to be to preserve his possession.

Ld. Cullen v. Rich. M. 14 G. 2. K. B.

In ejectment for mines, evidence of being lord of the manor is not sufficient, for it is necessary to shew an actual possession of the hereditament in question; and for the same reason a verdict in trover for lead dug out of the mine is no evidence, for trover may be brought on property without possession.

Co. L. 240.

Where the plaintiff is devisee of a term, he must prove the assent of the executor to the devise; to which purpose the case of *Young* and *Holmes* is worthy of notice; there the lessee for years had devised his term to his executor for life, paying 50 *l.* to *J. S.* remainder to the lessor of the plaintiff, the executor dying, his executrix entered; and on ejectment it was holden, first, that the executor took as executor and not as legatee, and therefore the remainder over not executed, and that it was incumbent on the remainder-man to prove a special assent thereto as to a legacy; upon which the plaintiff proved payment of the

Str. 70.

50 *l.*

50 *l.* and that was holden to be a sufficient assent, and the plaintiff recovered. But where it is a freehold it is not necessary to prove possession, for the law casts the freehold on the devisee; and though the heir have entered before him and died, yet that will not bar his entry.

The confession of lease, entry and ouster, is sufficient in all cases, except in the case of a fine * with proclamations, in which case it is necessary to prove an actual entry; and the lessor of the plaintiff directing one to deliver a declaration to the tenant in possession will not amount to such an entry; and by the 4 *An. c.* 16. *s.* 16. no claim or entry shall be of force to avoid a fine levied with proclamations, or shall be sufficient within the 21 *Jac.* 1. of limitations, unless the action be commenced within one year after making such entry or claim.—Note, the plaintiff must not lay his demise antecedent to his entry.

Oates on the demise of Wigfall against Bridon, East. 6 G. 3.
* Jenkin v. Prichard, C. B. Mich. 30 G. 2.
Str. 1086.

If *A.* enter on the premisses in *B.*'s name, but without any authority or command from *B.* but afterwards, and before the time when the demise is laid to be made. *B.* consents to *A.*'s entry, such subsequent consent is sufficient.

Str. 1128.

A fine having been levied, the lessor of the plaintiff proved that at the gate of the house in question he said to the tenant he was heir of the house and land, and forbade him to pay more rent to the defendant; but he did not enter into the house when he made the demand, on which it was agreed that the claim at the gate was not sufficient. Then it was proved that there was a court before the house, and which belonged to it, and that though the claim was at the gate, yet it was on the land, and not in the street; and that was holden good without question.

Skin. 412.

If the plaintiff prove that *A.* was in the possession of the premises in question, and that his lessor is heir to *A.* it is sufficient *prima facie*; for it shall be intended that *A.* had seisin in fee, till the contrary appear. And if he prove that his lessor or his ancestors had possession for 20 years without interruption; till the defendant obtain possession, it is a sufficient title; for by 21 *Jac.* 1. *c.* 16, twenty years possession tolls the entry of the person having right, and consequently though the very right be in the defendant, yet he cannot justify his ejecting the plaintiff. So if an ejectment be brought by a lord against a cottager, 20 years possession is a good title; for if the possession of the manor should be

Salk. 421.
Bishop and Edwards, per Powel J. on the Western circuit.

be a poſſeſſion of the cottage, the lord would have a better title to that than to any other part of his eſtate; yet a diſtinction has been taken and allowed by all the judges on a caſe reſerved by Lord Chief Baron *Pengelly*, that if a cottage is built in defiance of a lord, and quiet poſſeſſion has been had of it for 20 years, it is within the ſtatute: but if it were built at firſt by the lord's permiſſion, or any acknowledgement have been ſince made, (though it were 100 years ſince) the ſtatute will not run againſt the lord, for the poſſeſſion of a tenant at will for ever ſo many years is no diſſeiſin; there muſt be a tortious ouſter, and it is not to be preſumed a country fellow ſhould build in oppoſition to the lord, unleſs it be ſhewn, or conveyances are produced.

Ex dem. Liſle v. Harding, C. B. 1727. the caſe of Holt Wells, 1 R. A. 659. c. 2. Hob. 322. 1 R. A. 659. c. 12. Dormer and Forteſcue.

Receipt for rent by a ſtranger is no evidence of poſſeſſion, ſo as to take it out of him in whom the right is, for it is no diſſeiſin without the admiſſion of him who right has; not even though he make a leaſe to the tenant by indenture reſerving rent, unleſs he make an actual entry: So though the tenant declare he is in poſſeſſion for the ſtranger; though it may be proper to be left to a jury, eſpecially if the ſtranger have any colour of title.

1 Saund. 112.

The grantee of a rent charge, with power to enter and retain *quouſque* he be ſatisfied, has ſuch an eſtate that he may demiſe it to a plaintiff in ejectment. So may tenant by elegit, but it will be neceſſary for him to prove the judgment, the elegit taken out upon it, and the inquiſition and return thereupon, by which the land in queſtion is aſſigned to him; and if by that it appear, that more than a moiety was extended, he could not recover, for it would be *ipſo facto* void, and not need a judgment or *audita querela* to avoid it.

Salk. 560. Ld. Raym. 718.

Wood and Palmer, per Blencowe, Dorcheſter, 1699. Salk. MSS. Salk. 563.

So the conuſee of a ſtatute-merchant may bring ejectment, but then he muſt prove a copy of the ſtatute, and of the *capias ſi laicus* returned, and the extent alſo returned, and alſo the *liberate* returned; for though by the return of the extent an intereſt be veſted in the conuſee, yet the actual poſſeſſion of the intereſt is by the *liberate*.

Lindſey v. Lindſey, Mic. 8 Ann.

An extent gives only a poſſeſſion in law. So alſo it ſeems on an execution on a judgment in dower; and therefore they will not enable a ſheriff to uſe force, which may be neceſſary for the delivery of an actual poſſeſſion.

The

The plaintiff made title under one who obtained judgment by default against the heir upon a bond of his ancestor, and had taken out a general elegit against all the land of the heir. The defendant's title was likewise by judgment against the heir on a bond of his ancestor, and it was upon a bill filed precedent to the plaintiff's judgment, to which the heir pleaded *riens per discent præter* the land in question, and thereupon he took a special judgment against the assets confessed (but this was subsequent to the plaintiff's judgment) and had an *extendi facias* of the whole land, and was put in possession by the sheriff; and *per Holt*, this special judgment shall have relation to, and bind from the time of filing the original: but such a general judgment as the plaintiff's will not operate by way of relation, but bind only from the time the judgment was given; and thereupon the plaintiff was nonsuited. Carth. 245. Q.

If the ejectment be brought for a rectory, the plaintiff ought to prove his lessor was admitted, instituted and inducted, and has read and subscribed the 39 articles, and declared his assent and consent to all things contained in the Book of Common Prayer, but he need not prove a title in the patron; for institution and induction upon the presentation of a stranger is sufficient to bar him who has right in an ejectment, and to put the rightful patron to his *quare impedit*. But presentation ought to be proved, and institution would not be of itself sufficient evidence of it, though it were recited in the letters of institution, especially if induction or possession have not followed. But proof of a verbal presentation is sufficient; however that cannot be proved by the person who presented, *tho' he were only grantee of the avoidance*. But probably in such case evidence of general reputation would be admitted. 1 Sid. 220. 1 Vent. 15. 1 Sid. 426. Q. for this was denied by Lee J. in Rex v. Bray, post. part 6. 295.

The demise must be laid after the title accrues, otherwise the plaintiff will be nonsuited; but Lord *Hardwicke* inclined to think that, where an estate was settled to *A.* for life, remainder to his first and other sons, a posthumous son might lay the demise from the time of his father's death, and that the defendant would be estopped to say he was not born, by 10 & 11 *W.* 3. *c.* 16.—Note, *Salk.* 228. makes a *Quære*, Whether this statute extend to a devise, because the words are, "Where an estate by marriage or other settlement is limited," but there seems no just ground for the doubt. Basset and Basset, 16 Dec. 1744, in Canc.

Eject-

Cr. J. 96. Adams and Goose.

Ejectment of a leaſe 6 *September* 2 *Jac.* and that he was poſſeſſed till the defendant *poſtea, ſcilicet,* 4 *September* 2 *Jac.* ejected him; after verdict for the plaintiff it was moved in arreſt of judgment, but the declaration was holden to be good, for when the declaration is, that he was poſſeſſed, *virtute dimiſſionis, quouſque poſtea, ſcilicet,* 4 *September* 2 *Jac.* he was ejected; thoſe words *ſcilicet* 4 *September* 2 *Jac.* are impoſſible and repugnant, therefore muſt be rejected.

N. B. This caſe was cited in 1 *Sid.* 8. and the difference taken at the bar, and there it appeared on the plaintiff's own ſhewing, that he entered before the leaſe commenced, and therefore was a diſſeiſor; but here that he entered by force of the leaſe: However, Sir *O. B.* Ch. J. ſaid he thought there was no reaſon for the judgment: Yet I am ſtrongly inclined to think that in theſe days the courts would in ſupport of the action hold the caſe of *Adams* and *Gooſe* to be good law.

Swymmer & al' (ex dem.) v. Groſvenor Bart. & al' at Salop aſſizes, 1752 cor. Gundry J.

In ejectment the plaintiff declared upon a leaſe dated 1 *Feb.* 1742, to hold from the 8th of *January* before; that afterwards, *viz.* 28th *January* 1752, the defendants ejected him. It was inſiſted for the defendants, that the ejectment was laid to be before the plaintiff's title under the leaſe, which was not made till the 1ſt of *February*, and 1 *Sid.* 8. was cited; but it was holden that the day of the ejectment being laid under a *viz.* was ſurpluſage, and that *afterwards* ſhould relate to the time of making the leaſe, and then all would be well enough, and the plaintiff had a verdict.

Bedford (leſſee of Carruther) v. Dendien, Sittings at Middleſex after Tr. 5 G. 3.

The leaſe declared upon was from the 25th of *March* 1765, for ſeven years. The plaintiff proved that *J. S.* was ſeiſed; and that by indenture in 1763, he demiſed the premiſſes in queſtion to *D.* for ſeven years, to commence at *Midſummer* 1763, and that in 1764 *D.* aſſigned the reſidue of the term then unexpired to *Carruthers*. It was inſiſted for the defendant, that though in ejectment the leaſe is fictitious, yet the plaintiff muſt declare on ſuch a leaſe as ſuits with the title of his leſſor; here if he recover at all, he muſt recover a term which is of two years longer duration than his title, and 2 *Lev.* 140. *Brownl.* 133. were cited. But *per* Lord *Mansfield*, there is nothing in the objection, for if the leſſor have a title, though but for a week, he ought to recover; for the true queſtion in an ejectment is, who has the poſſeſſory right. Suppoſe a perſon has an intereſt for three years only, and ſhould make a leaſe for five years, it would be good for the three years.

If

If there be ſeveral leſſors, and you lay in the declaration *quod dimiſerunt*, you muſt ſhew in them ſuch a title that they might demiſe the whole; and therefore if any of the leſſors have not a legal intereſt in the whole premiſſes, he cannot in law be ſaid to demiſe them, for it is only his confirmation where he is not concerned in intereſt: So if the plaintiff were to declare upon a leaſe made by *A.* and *B.* and it were to appear on the trial, that *A.* was tenant for life, remainder to *B.* in fee, it would be bad: So if *A.* and *B.* were tenants in common; but it would be otherwiſe if they were jointenants, and the reaſon of the difference is, that tenants in common are in of ſeveral titles, and therefore the freehold is ſeveral, and conſequently each of them cannot demiſe the whole: But jointenants are ſeiſed *per my et per tout*, and therefore each may be ſaid to demiſe the whole; and coparceners ſtand upon the ſame foundation. Therefore there ought to be a different count on the demiſe of each tenant in common, or they may join in a leaſe to a third perſon, and that leſſee make a leaſe to try the title.

Cr. J. 166. 6 Co. 14. b. 1 Show. 342. Morris and Barrow, Hil. 16 G. 2. 1 Raym. 726. Lit. ſect. 316. Law of Ejectments 86.

If the plaintiff make title in the leſſor as lord of a manor, who has right by forfeiture of a copyhold, he ought to prove that his leſſor is lord, and the defendant a copyholder, and that he committed a forfeiture, but the preſentment of the forfeiture need not be proved, nor the entry or ſeizure of the lord for the forfeiture.

Peters ex dem. Epiſ. Winton v. Mills & al' per Tracy, Surry, 1707.

If a copyholder without licence make a leaſe for one year, or with licence make a leaſe for many years, and the leſſee be ejected, he ſhall not ſue in the lord's court by plaint, but ſhall have an ejectment at common law, becauſe he has got a cuſtomary eſtate by copy, but a warrantable eſtate by the rules of the common law.

Co. Copyh. ſ. 51.

Note; If the copyholders of a manor belonging to a biſhoprick, during the vacancy of the ſee commit a forfeiture by cutting timber, the ſucceeding biſhop may bring ejectment. If an ejectment be brought againſt the leſſee for years of a copyholder (relying upon the leaſe as a forfeiture) the plaintiff muſt prove an actual admittance of the copyholder; and it will not be ſufficient to prove the father admitted, and that it deſcended to the defendant's leſſor as ſon and heir, and that he had paid quit-rents; for a copyholder cannot make a leaſe except to try a title before admittance; for nothing veſts in him before

Read and Allen, per Comyns, Oxford Circuit, 1730. 1 Raym. 726.

fore admittance and an actual entry; and therefore if after admittance he were to surrender without making an actual entry, the surrender would be void. And note; till admittance of surrenderee the copyhold remains in the surrenderor, and if he die his heir may bring ejectment.

Yelv. 144. Cr. J. 31.

Note; Admittance of tenant for life is admittance of him in remainder, so as to make his surrender good.

Cr. J. 31.

Copyholds are not within the statute against fraudulent conveyances, and therefore if the plaintiff claim under a voluntary conveyance, though the defendant claim under a subsequent purchase for a valuable consideration, yet the plaintiff shall recover.

Per Blencowe at Launceston, 1699. Sed vi. Dougl. 690. n.

The recital of the will in the copy of the admittance is good evidence of the devise against the lord or any other stranger: But if the suit be between the heir of the copyholder and the devisee, the will itself ought to be produced.

1 Raym. 735.

A man makes a mortgage for years to *A.* who without the mortgagor's joining assigns to *B.* who assigns to *C. C.* may bring ejectment against the mortgagor, for upon executing the deed of mortgage, the mortgagor by the covenant to enjoy till default of payment is tenant at will, and the assignment of the mortgagee could only make him tenant at sufferance.

1 Salk. 245.

But it has been said, that it would be otherwise if the mortgagor were to die, and his heir enter, and then the mortgagee make an assignment without entry, or the heir of the mortgagor joining; for the entry of such heir would be tortious, and consequently the mortgagee would be out of possession, and his assignment void.

Ibid. tamen quære.

If the plaintiff make title under an assignment of a term by an administrator, if he cannot produce the letters of administration, the book of the ecclesiastical court where the order was entered for granting them is evidence; or a copy of the book will be sufficient; but the administrator shall not be permitted to give such book or copy in evidence, until he have proved the administration under the seal of the court lost.

1 Lev. 25. Lewis and Brag, M. 16 G. 2. coram Lee, G. Hall.Cr. El. 13.

If a man bring an ejectment for 100 acres, and make a title to 40, he shall recover *pro tanto*, and as to the other the defendant shall be found not guilty. So if an ejectment be brought for a house, and the proof be that part of the house only is erected on the plaintiff's land by incroachment: So if the plaintiff make a title but to a moiety of that for which he brings

2 R. A. 704.22. Hob. 120. 2 R. A. 719. c. 19. 3 Lev. 334.

brings his ejectment, if it be by bill he ſhall recover; and ſo is the determination in *Bracebridge*'s caſe: But *Plowden* in the report of that caſe ſays, he found great fault with himſelf afterwards in forgetting to ſpeak to that point; for he ſays the regiſter makes a difference between the demand of an entirety and of a moiety: that entireties are firſt to be demanded in a writ, and that if a man were to bring a writ of entry *ſur* diſſeiſin for one acre, and the tenant plead *ne diſſeiſa pas*, and the jury find that he had a right to a moiety, and was diſſeiſed of that, and that the tenant had good title to the other moiety, he ſhould recover nothing, becauſe he might have another form of a writ for the moiety; but, ſays he, if it were found that he was diſſeiſed *de dimidio dict. acr' et nient plus*, then he ſhould have judgment for that, for that is ſeveral, and it appeared probable to him that the ſuit ſhould abate for the whole in this caſe upon a bill, as it would upon an original writ, if exception had been taken to it.

But this defect, even in the caſe of a writ, is now aided after verdict, by 18 *El.*

It has been ſaid, if a man bring ejectment for one acre of land in *D.* and *S.* and the whole lies in *D.* he ſhall recover: But if an ejectment be of the tenth part of a meſſuage in the pariſhes of *B.* and *C.* and it appear on evidence that the whole meſſuage lay in the pariſh of *B.* the declaration being preciſely of the tenth part of an entire thing, the evidence will not maintain it. 3 Lev. 334. Quære.

Ejectment will not lie of 20 acres of arable and paſture without ſhewing how much of each: nor will it lie of a cloſe of meadow called *Partridge's Lees*, containing 10 acres more or leſs, becauſe the certainty of acres ought to appear in the declaration; nor will it lie for a cloſe containing three acres, without aſcertaining whether arable, meadow, or paſture. Salk. 254. 11 Co. 55. Holdfaſt and Wright, M. 12 G. 1. C. B. Savil's caſe, 11 Co.

If one tenant in common bring an ejectment againſt another, there is no occaſion to prove an actual entry and ouſter, for that is confeſſed by the rule: And if the fact be that there has been no actual ouſter, the defendant ought to apply to the court not to compel him to confeſs, or to permit him to do it ſpecially; which they will do, where it is only matter of account, and the only ouſter is by pernancy of the profits, without an actual obſtruction of the other to occupy. Wigfall v. Brydon, Eaſt. 6 G. 3

I Note;

Co. L. 199. b. Salk. 286. Ca. K. B. 657.

Note; Receiving the whole profits is no ejectment. So the levying a fine of the whole land. So the not consenting to have the rents raised.

Smith and Man, Tr. 21 G. 2. on a case reserved. tamen qu. & vi. infra.

Though the defendant confess lease, entry and ouster, yet he may deny that he is in possession of the premisses for which the plaintiff goes, and put the plaintiff upon proving it; and if he cannot, he will be nonsuited.

Ibid.

And in case the landlord have been made defendant instead of his tenants, the plaintiff must prove the tenants in possession, for the defendant does not, by entering into the rule, confess himself to be landlord of any premises, but of such as were in the possession of such tenants. However, it has been said, that if there be but one defendant as tenant in possession, the plaintiff need not prove him in possession, because if he be not, why did he enter into the rule?

Doe ex dem. Jesse v. Bacchus, M. 30 G. 2. K. B. at Sittings.

If the defendant prove a title out of the lessor, it is sufficient though he have no title himself; but he ought to prove a subsisting title out of the lessor; for producing an ancient lease for 1000 years will not be sufficient, unless he likewise prove possession under such lease within twenty years.

Lindsey v. Lindsey, Mic. 8. Ann.

But in an ejectment brought by a second mortgagee against the mortgagor, he shall not give in evidence the title of the first mortgagee in bar of the second, because he is barred to aver contrary to his own act that he had nothing in the land when he took upon him to convey by the second mortgage.

Wilson and Witherby, 8 An. in Kent, per Holt, Ch. J.

So if the defendant produce a mortgage deed, where the interest has not been paid, and the mortgagee never entered, it will not be sufficient to defeat the lessor who claims under the mortgagor, because it will be presumed that the money was paid at the day, and consequently that it is no subsisting title; but if the defendant prove interest paid upon such mortgage after the time of redemption, and within twenty years, it will be sufficient to nonsuit the plaintiff.

On the argument of the case of *Lade, Bart.* v. *Holford & al.* East. 3 G. 3. B. R. *Ld. Mansfield* declared that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct the jury to presume it surrendered.

Farmer ex dem. Earl v. Rogers & al. Tr. 1755. C. B.

The defendant produced a mortgage for years by deed from the plaintiff's ancestor, upon which was an indorsement *in hæc verba,*

verba, "Received of Mrs. *M. O.* 500 *l.* on the within re- "cited mortgage, and all intereſt due to this day; and I do "hereby releaſe to the ſaid *M. O.* and diſcharge the mort- "gaged premiſſes from the ſaid term of 500 years." On a caſe reſerved the court held, 1. That theſe words amounted to a ſurrender of the term. 2. That ſuch ſurrender might be by note in writing, by the ſtatute of frauds. 3. That a note in writing was not required to be ſtamped. But though a ſurrender or an aſſignment of a term may be made by note in writing without ſtamps, yet if it be made by deed under ſeal, it muſt be ſtamped. Goodright ex dem. Ford v. Gregory. Mich. 14 G. 3.

By 21 *H.* 8. *c.* 15. A termor may enter immediately after the *habere facias ſeiſinam* on a common recovery, and give his term in evidence upon an ejectment brought againſt him; but if the defendant be a ſtranger to the term, he is not within the benefit of the ſtatute, ſo as to give the term of a third perſon in evidence to falſify the recovery againſt himſelf, or thoſe under whom he claims. 2 Raym. 1294.

Where the leſſor of the plaintiff is an infant, or reſides abroad, the court will upon motion ſtay proceedings till a real leſſee is named, or ſecurity given for payment of the coſts. Birchman and Wright, E. 1734.

The court will always ſtay proceedings upon a ſecond ejectment till the coſts of the firſt are paid, though it were brought in a different court. So where an ejectment was brought on the demiſe of huſband and wife, in which they were nonſuited, after the huſband's death the wife bringing a freſh ejectment, the court ſtayed proceedings till the coſts of the former nonſuit were paid. Salk. 255. Ducheſs of Hamilton's caſe, E. 14 G. 2.

If an ejectment be brought in order to try the validity of a will, and a parcel of land is inſerted in the declaration to which the plaintiff has an undoubted right (as copyhold land where there is no ſurrender to the uſe of the will,) and the defendant not obſerving it confeſſes leaſe, entry, and ouſter for the whole, the plaintiff ſhall not on this account be excuſed from the coſts, but the court will give the defendant leave to retract his confeſſion as to this parcel. Odie and Preſton, B. R. M. 27 Car. 2.

As in this action more frequently than in any other the legitimacy of the parties comes in queſtion, it may be proper in this place to take notice, that it is the practice to admit evidence of what the parties have been heard to ſay as to their being or not being married; and with reaſon, for the pre-

ſumption ariſing from their cohabitation, is either ſtrengthened or weakened by ſuch declarations, which are not to be given in evidence directly, but may be aſſigned by the witneſſes as a reaſon for their belief.

Hil. 17 G. 2. poſt. 241.

In *May* and *May*, which was tried in *K. B.* at bar upon an iſſue directed out of chancery, the preamble of an act of parliament reciting that the plaintiff's father was not married, and to the truth of which he was proved to have been ſworn, was given in evidence, yet upon proof of a conſtant cohabitation, and his owning her upon all other occaſions to be his wife, the plaintiff obtained a verdict.

Pariſh of St. Peter in Worceſter v. Old Swinford. Eaſt. 8 G. 2. B. R.

But on an appeal againſt an order of removal, where the ſeſſions ſtated that *J. H.* the father of the pauper ſwore that he had travelled with *H. A.* for ſeven years, and during all that time they cohabited as man and wife: That ſhe had the pauper and two other children by him born in *Swinford* pariſh: and that they were reputed man and wife, and continued ſo till the woman's death, but that they never were married; the court held, that as all this caſe was diſcloſed on the ſole evidence of the father, however difficult it might be to admit his evidence to baſtardize a reputed legitimate child, yet as all depended on the father's teſtimony, the whole muſt be taken together, and then it appeared that he never was married; and conſequently the child being a baſtard was ſettled at *Swinford*. And the court ſaid there was no colour to ſay the father was ſwearing to diſcharge himſelf; for if the child were legitimate, he was bound to keep it by 43 *Eliz.* and if a baſtard, he muſt indemnify the pariſh by 18 *Eliz.*

Rex v. Inhabitants of Bedel, Tr. 11 G. 2.

The old rule of the preſumption of law, that the huſband continuing within the four ſeas, and being alive at the child's birth, the child could not be a baſtard, is exploded.

1 Salk. 123.

Where a woman is ſeparated from her huſband by a divorce *a menſa et thoro*, the children ſhe has during the ſeparation are baſtards, for the court will intend a due obedience to the ſentence unleſs the contrary be ſhewn; but if baron and feme, without ſentence, part and live ſeparate, the children ſhall be taken to be legitimate, and ſo deemed till the contrary be proved, for acceſs ſhall be intended. But if a ſpecial verdict finds the man had no acceſs, it is a baſtard, and ſo was the opinion of my Lord *Hale* in the caſe of *Dickins* v. *Collins*, S. P. *Hil.* 3 *Geo.* 1. between the pariſhes of *St. Andrew's* and *St. Bride's*.

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The wife gave evidence that the defendant (upon whom an order of bastardy in this case was made) had carnal knowledge of her body about *August* 1732, and several times since, and was the father of the child, which was born in 1733.—— That her husband had no access to her from *May* 1731.—— Other witnesses proved the husband to be within seven miles of her all the time. The question was, Whether the wife were a competent witness to bastardize the child. And *per curiam*, such facts as cannot in their nature be proved by any other person, must be proved by the wife; as here the act of incontinence, which lay in the wife's own knowledge: but she ought not to be permitted to prove the want of access, which might be notorious to the whole neighbourhood. Rex v. Reading, B. R. Mich. 8 G. 2. Cas. temp. Ld. Hardwicke, 79. Bott.

Note; The want of access in that case tended to discharge her husband from the maintenance of the child, as it proved the child to be the bastard of another man; but after her husband's death she might be a witness to prove the child a bastard as well as the father, who was admitted for that purpose in the case before, between the parish of *St. Peter*'s in *Worcester* and the parish of *Old Swinford*.

In *Pendril* and *Pendril*, *Hil.* 5 *G.* 2. Lord *Raymond* would not suffer the wife's declaration, that she should not know her husband by sight, *&c.* to be given in evidence, till after she had been produced on the other side; the fact of the marriage not being disputed, but only the legitimacy. Stra. 925. post. 294.

In the same case the Ch. Just. admitted evidence to be given of the mother's being a woman of ill fame.

The declarations of the wife without oath were properly rejected in that case, because they were not the best evidence. The husband was dead, and she might be examined. *Stra.* says, that the C. J. would not allow the wife's declarations to be given in evidence, till she had been called, and *denied them on cross examination*.—After that they were evidence to impeach her credit.—The reason here given, *viz.* "because "the fact of the marriage was not disputed, but only the legi-"timacy," is not mentioned in *Strange*. The C. J. in directing the jury said, that the old notion of the presumption *infra quatuor maria* was exploded, that the evidence to overturn this presumption need not be so strong as was insisted upon by the plaintiff's counsel. That the evidence was the

ſame in this as in all other caſes, a probable evidence was ſufficient, and it was not neceſſary to prove acceſs impoſſible between them. The jury found that the plaintiff was a baſtard without going from the bar, upon which the C. J. commended the verdict.

6 G. 2. at Bar. Str. 940. In *Lomax* and *Holmden* the marriage being proved, and evidence given of the huſband's being frequently in *London* where the mother lived, ſo that acceſs muſt be preſumed, the defendants were admitted to give evidence of his inability from a bad habit of body; but their evidence going only to an improbability, and not to an impoſſibility, it was thought not ſufficient, and the plaintiff had a verdict.

Carth. 225. In *Jones* and *Bow*, the defendant, by way of anticipation to the evidence the plaintiff was about to give, moved the court that the plaintiff ought not to be allowed to give evidence of the marriage of Sir *Robert Carr* to *J. S.* under which he claimed, becauſe there was a ſentence in the arches in a cauſe brought againſt her *cauſa jactitationis maritagii*, that there was no marriage between them, but that they were free one of another; and upon debate the court were all of opinion, that this ſentence, whilſt unrepealed, was concluſive againſt all matters precedent.

By 26 *Geo.* 2. *c.* 33. If any perſon ſhall ſolemnize matrimony in any other place than a church, or publick chapel, (unleſs by ſpecial licence from the archbiſhop of *Canterbury*) or without publication of banns, or licence in a church or chapel, the marriage ſhall be void. This act does not extend to marriages ſolemnized in *Scotland*, or in parts beyond the ſeas; nor to marriages amongſt Quakers or Jews, where both parties are ſuch.

And by the ſame act, all marriages ſolemnized by licence, where either of the parties not being a widower or widow, is under the age of twenty-one years, which ſhall be had without the conſent of the father or guardian of ſuch party, ſhall be abſolutely void.

Compton v. Bearcroft cor. Delegates, 1 Dec. 1768. The appellant and reſpondent, both *Engliſh* ſubjects, and the appellant being under age, ran away without the conſent of her guardian, and were married in *Scotland*; and on a ſuit brought

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in the spiritual court to annul the marriage, it was holden that the marriage was good.

This act doth not take away the evidence of presumption from cohabitation. But if the evidence be clear that the marriage was not celebrated according to the requisitions of the act, it is totally void, and no declaratory sentence in the ecclesiastical court is necessary. Rex v. Preston next Travasham, M. 33 G. 2. B. R.

By the same act all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and shall be entered in the register; in which entry shall be expressed whether the marriage were celebrated by banns or licence, and signed by the minister and the parties married, and attested by two witnesses.

The sessions stated in a case reserved by them, that the entry made in the register was not subscribed by the minister and two witnesses, *Per curiam.*—In a suit of jactitation of marriage in the spiritual court, whilst the parties are alive, they are put to prove all ceremonies: But in all other cases, proof by witnesses who saw the marriage, is *prima facie* sufficient; and whoever would impeach it, must shew wherein it is irregular. In the present case the marriage appears by the witnesses, and the register, to have been by banns; and therefore there is no colour for any objection; for the entry of the register is not of the essence of the marriage. Rex v. Inhabitants of St. Devereux, East. 2 G. 3. B. R.

It is not precisely settled what length of time shall be allowed for a woman to go after her husband's death. *Tr.* 18 *E.* 1. *Rot.* 13, because a feme went eleven months after the death of the husband, it was resolved the issue was not legitimate, being born *post ultimum tempus mulieribus pariendo constitutum.* But in *Alsop* and *Bowtrell*, where the husband died 23d of *March* and the child was born the 5th of *January*; upon proof of the mother having been hardly dealt with, forced to lie in streets, &c. and upon an examination of physicians, the court held the child might be legitimate. Cr. J. 541.

Note; the rule *quod non est justum aliquem post mortem facere bastardum* holds place only in the case of bastard *eigne* and *mulier puisne*. But if *H.* marry a woman, and that woman marry again, living *H.* the last marriage is void without any divorce, and the jury shall try the fact which proves it not a marriage. Salk. 120. Pride and Earl of Bath Co. L. 244.

N. B. By 16 & 17 *Car.* 2. *c.* 8. No execution ſhall be ſtayed by writ of error after verdict and judgment thereupon, unleſs the plaintiff in error became bound to the defendant to pay the damages and coſts in caſe the judgment be affirmed, or the plaintiff diſcontinue or be nonſuited, and a writ ſhall iſſue in ſuch caſe to enquire of the meſne profits and damages by any waſte.

Ante.

CHAPTER III.

Of the Writ of Right.

BY the 32 *H.* 8. *c.* 2. No perſon ſhall have a writ of right of the poſſeſſion of his anceſtor, but within threeſcore years, nor of his own but within thirty years.

Salk. 285. A claim or entry to prevent the ſtatute muſt be upon the land, unleſs there ſhall be ſome ſpecial reaſon to the contrary.

Note; The poſſeſſion of one jointenant is the poſſeſſion of another, ſo far as to prevent the ſtatute.

CHAPTER IV.

Of the Writ of Formedon.

BY 21 *Jac.* 1. *c.* 16. All writs of formedon ſhall be ſued within 20 years next after the title or cauſe of action firſt deſcended, or fallen, with a proviſo that if the perſon entitled to ſuch writ be, at the time of the ſaid writ firſt deſcended or fallen, within 21 years, feme covert, &c. then ſuch perſon and his heirs may, notwithſtanding the ſaid 20 years be expired, bring his action, ſo as it be within ten years, &c.

2 R. A. 676. pl. 13. Ibid. pl. 14. If the tenant plead that *A. ne done pas*, it is not ſufficient for the demandant to prove the gift by another: So if the demand-

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ant count of a gift in frank-marriage, a gift with a remainder in fee is not sufficient evidence.

In a formedon *in discender* the demandant must make himself heir to him who was last seised by force of the intail; but he need not mention an anceſtor who happened to be inheritable, but never was actually seised by force of the intail. 8 Co. 88. b.

In a formedon in reverter the demandant need not alledge that all the issue inheritable are dead, but it is sufficient to say the donee is dead without issue; for he is a stranger to the pedigree: But he must not omit any of his own anceſtors who were seised of the reversion. Dy. 14. Booth. 153.

In a formedon in reverter the taking the profits must be alledged both in donor and donee: So in a formedon in remainder, if a fee-simple be demanded; but if an estate tail only be demanded (as in a formedon *in discender*) it is sufficient to alledge explees in the donee only. 2 Lutw. 963.

In a formedon *in discender* by husband and wife in right of the wife, the discent must be made to the wife alone; but in a formedon in reverter it may be laid either to the wife, or to the husband and wife. Hob. 11.

The defendant pleading never tenant of the freehold, in abatement, the plaintiff refused to accept the plea; but upon motion the plea was ordered to be received, for it cannot be pleaded otherwise than in abatement. 1 Barnes. 238.

CHAPTER V.

Of the Writ of Dower.

DAMAGES in dower are given by the statute of *Merton*, *c.* 1. but it extends only to lands whereof the husband died seised; and therefore if the jury do not find that he died seised, judgment for damages will be reversed; they must find too of what estate he died seised, *viz.* An estate in fee or in tail; for if the husband alien, and take back an estate for life, the wife shall recover dower, but no damages. Vide Co. L. 32. b. an exposition of this statute. Yelv. 112.

If the jury find the husband died seised, they must find the time when, the annual value of the land, damages on account 2 Saund. 331.

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of the detention and costs; but if they find the husband was seised but did not die so, then no costs or damages, but only the value of the land; for damages are given by the statute of *Merton* only where the husband died seised, and the statute of *Glou-cester* gives costs only where the plaintiff recovers damages.

Ibid.

The reason why the jury are to find the value of the land in case the husband died seised, is that the court may give damages pursuant to the statute of *Merton*, from the death of the husband to the time of the judgment. And if the heir sell to *J. S.* and the widow recover her dower against him, he must pay the whole mesne profits from the death of the husband, though he have not himself been half the time in possession: She is intitled by the statute and can recover only against the tenant.

Brown & Ux' v. Smith, H. 25 & 26 Car. 2. c. 8.

Though the statute say only that she shall recover damages to the time of the judgment, yet if she obtain judgment by default, upon a writ of enquiry the jury may give her damages to the time of the inquisition, unless she were in possession before by virtue of an execution awarded upon the judgment by default. The jury may assess damages beyond the revenue, for she may have sustained more.

1 Leon. 56.

Damages must be after demand of dower, for the heir is not bound to assign till demanded. But unless the heir plead *tout jours prist*, he shall not take advantage of the widow's laches in not demanding her dower; and though he plead *tout temps prist*, yet she shall recover damages from the teste of the original to the execution of the writ of entry; but if the heir assign dower, and the wife accept thereof, she loses her damages.

Co. L. 32. Kent and Kent, M. 1733 K. B. Yeo and Yeo. Tr. 14 G. 2. K. B Co. L. 32.

Upon a trial at bar the issue was, if there were a demand of dower, to intitle the plaintiff to damages, she proved an actual demand of the heir who was an infant, and the court held that dower was demandable of the heir, though he was under the age of 14, and that the not assigning of dower, though the infant did not refuse to do it, but was prevented by his guardian, was a refusal in law sufficient to intitle the plaintiff to damages.

Corsellis and Corsellis, H. 29 & 30 Car. 2. C. B.

Detinue of charters of the same land is a good plea in delay of dower, and if she deny the detainer, and that be found against her, she shall lose her dower.

Hob. 199.

He that pleads detainment of charters ought to alledge what, and likewise plead that he has been always ready to render dower, and yet is, if the defendant would deliver the charters; therefore it cannot be pleaded after impalance.

9 Co. 18. Salk 252. 11 H. 6. 4.

The tenant pleaded that the demandant detained certain charters, *&c.* and if she will render, *&c.* then ready to render dower, *&c.* the demandant produced the deed, and prayed dower, and the deed was read, so that the court perceived it was the same deed; by which the demandant recovered. Br. Dower, 53.

But if a wife be with child, the heir for the time being cannot plead detinue of charters, for she may keep them for the infant. Br. Dower, 8.

If the defendant plead *ne unques seisie que dower*, she may give in evidence a release to her husband, or a surrender to him by one who was seised as jointenant with him. So if the demand be of an advowson or rent charge, she may give a grant of the rent or advowson in evidence, and that her husband died the day before payment or presentment. 2 R. A. 676. c. 10.

Father tenant for life, remainder to his son in tail, remainder to the father in fee, father and son were hanged out of the same cart for felony, The father's widow brought a writ of dower, and upon the issue *ne unques seisie*, upon proving by witnesses that the father moved his feet after the death of the son, she recovered. Noy 64. Cr. E. 503.

If the tenant plead *ne unques accouple in loial matrimonie*, it shall not be tried by a jury, but a writ shall issue to the bishop to certify it.

The defendants having pleaded *ne unques accouple*, the plaintiff replied a sentence of the ecclesiastical court in a cause of divorce brought by Sir *W. W.* against her, charging that she was his wife, and had committed adultery with *J. R.* to which she pleaded, that she was the lawful wife of the said *J. R.* and not of the said Sir *W. W.* and that afterwards *J. R.* died, and the cause coming on to be heard, the judge did declare that the plaintiff had been the wife, and was then the widow of the said *J. R.* and prayed judgment whether the defendants were not estopped to plead *ne unques accouple*. The court held it no estoppel, as the bishop's certificate in an action between the plaintiff and other defendants would have been. Robins and Crutchly & al' T. 33 G. 2.

If issue be taken upon the life or death of the baron, it shall not be tried by a jury, but by the court, and a day shall be given to the parties to produce their witnesses, and presumptive evidence will be sufficient; but *quære*, whether if it be found against the tenant, it will be peremptory, or whether he shall not plead to the right of dower. Dy. 185. pl. 65.

By

By 16 & 17 *Car.* 2. *c.* 8. Execution ſhall not be ſtaid by writ of error upon any judgment after verdict, unleſs the plaintiff become bound to pay damages and coſts in caſe the judgment be affirmed, or the plaintiff diſcontinue, or be nonſuited; and a writ ſhall iſſue to enquire of meſne profits and damages by waſte done after the firſt judgment.

Str. 971.

Roe v. Roach, E. 11 G. 2. Andr. 153.

Note; If the judgment be affirmed *in dom. proc.* and coſts given, the defendant may bring an action on the recognizance for ſuch coſts, without ſuing out a writ of enquiry.

CHAPTER VI.

Of Waſte.

BY the ſtatute of *Glouceſter*, the plaintiff in an action of waſte is to recover the thing waſted, and treble damages.

Dy. 19. pl. 110.

If a leaſe be made excepting the wood and timber, an action of waſte will not lie againſt the leſſee for cutting it down, becauſe not demiſed.

5 Co. 12.

If a termor aſſign his term except the trees, and after the trees are cut down, waſte will lie againſt the aſſignee, for the exception was void; but if tenant for life make a leaſe for years, he may except the trees, becauſe he ſtill remains tenant and is chargeable in waſte.

Strode v. Devenish, M. 1 G. 1.

The plaintiff declared that being ſeiſed in fee of a farm called *Strode*'s farm, he leaſed the ſaid farm to the defendant for 99 years, and that the defendant did waſte in the farm, to wit, in cutting down 200 oaks in a cloſe called *Webb*'s cloſe, parcel of the ſaid farm; and on demurrer it was holden certain enough, for the declaration follows the leaſe, and the waſte is aſſigned in a particular place alledged to be parcel of the demiſed premiſes.

Lutw. 1547.

If the defendant plead *nul waſte fait*, and iſſue is taken thereupon, the plaintiff muſt prove his title as laid in the declaration, for it is not admitted by the plea. The plaintiff muſt likewiſe prove the kind of waſte laid in his declaration; and therefore if he alledge waſte in cutting trees, and the jury find that he ſtubbed them and did not cut them, it is variance.

Where-

Wherever the plaintiff is to recover *per visum juratorum*, there ought to be six of the jury that have had the view; therefore it seems a good exception for the defendant at the trial, that there are not six viewers appear. Co. L. 158.

The defendant, upon the general issue *nul waste fait*, may give in evidence any thing which proves it no waste; as that it was by tempest, &c. but not that it was for repairs, or that the plaintiff gave him leave to cut, or that he had repaired before the action brought. Neither will it be any defence that a stranger did it, for if the plaintiff should not have his action of waste, he would be without remedy; and the defendant may bring trespass against the stranger, and recover his damages. But it would be a good plea to say that the plaintiff himself did it. Co. L. 283. 2 Inst. 145. 50 H. 4. 2. b.

If waste be assigned in three houses, two gardens, &c. the jury ought to find damages severally for every of them, for if it be but of small value for any of them, the court will not adjudge it waste as to that part; but if the jury give entire damages, it shall not be intended that there were petit damages in any, and therefore the verdict will be good. Cr. Car. 414. 452.

If the plaintiff have judgment by *nihil dicit*, and a writ of enquiry issue, the jury shall enquire of the damages, but not of the place wasted, for that is confessed. But after a recovery by default there goes out a writ to enquire *de vasto facto, et quod vastum predict' A.* (the defendant) *fecit*, so as the defendant may give evidence, and the jury find that no waste was done, or if they find damages only to a small sum, the plaintiff shall not have judgment. Winch. 5. Co. L. 355, 356. Br. Waste, 70.

CHAPTER VII.

Of Writs of Assize.

WRITS of assize are of two sorts, *novel disseisin* and *mort de ancestor*; the first process is an original out of chancery directed to the sheriff, commanding him to return a jury, who are called recognitors of the assize; they are to be taken in *K. B.* or *C. B.* for the county in which they sit, and for all others in their proper counties, but to be adjourned for diffi-

difficulty into *C. B.* The tenant is to appear and plead inftantly (unlefs the court will allow him an imparlance) on the fame day the writ is returnable, for the demandant is to count immediately; and therefore if he be not ready he fhall be non-

Salk. 82, 83. fuited, but he may bring a new affize. And note; If the defendant plead in abatement, he muft plead over in bar at the fame time; and if there be feveral defendants, and any of them do not appear the firft day, it fhall be taken by default againft them.

Co. L. 355. 2 Lev. 120. Though the affize be awarded by default, yet the tenant may give evidence, and the jurors find for him, but he cannot plead in abatement or bar of the affize, nor challenge.

An affize of *novel diffeifin* muft be founded upon a feifin in him who brings the writ and therefore this writ is rarely ufed

Co. L. 47. now-a-days for any thing befide the recovery of an office. It will lie as well for an office for life as in fee, though the ftatute of *Weftminfter* 2. *c.* 25. mentions only offices in fee, but that ftatute is made in affirmance of the common law. The ftatute with the reading upon it in 2 *Inft.* and *Viner's Abr.* tit. *Affize* (A. 2.) is worth confulting, but it being a fuit not much in ufe, I fhall not tranfcribe their learning.

Dy. 84. Cr. J. 335. The plaint need not be fo certain (where it is for land) as in other writs, becaufe the judgment is to recover *per vifum recognitorum*, therefore if it be fo certain that the recognitors may put the demandant into poffeffion, it is fufficient. But the plaintiff muft prove his title precifely as laid.

Webb's cafe, 8 Co. 49. If the affize be brought for an ancient office, the demandant need not fhew what fee or profit is belonging to it, for it fhall be intended there is fome; but for an office newly created he muft fhew what fee or profit is granted for the execution of it, for no affize lies for an office without fee or profit.

2 Lev. 108. An affize of *novel diffeifin* muft be founded on an actual feifin: And therefore in an affize for the office of ferjeant at mace of the Houfe of Commons, where to prove the feifin, he proved that he went to the houfe and demanded his place, but received no fees, but that in an action on the cafe for this difturbance he recovered 300 *l.* damage; it was holden not to be fufficient proof of feifin, and the plaintiff was nonfuited.

2 Lev. 120. But in a new affize, the plaintiff giving in evidence, that one committed by the houfe to the defendant, compounded with the

the plaintiff for the fees (though the defendant was in possession both before and after) it was holden to be a good seisin: It was also proved that the plaintiff in the lobby laid his hands upon the mace then in the defendant's hands, and would have taken it, but the defendant hindered him; and this was holden good evidence of seisin and disseisin, and the demandant had a verdict.

In an assize for estovers to a house, upon issue *nul tort, nul disseisin*, the defendant may give in evidence, that the house is fallen down. So in an assize for land, he may upon the general issue give in evidence a lease of the land made to him before the disseisin, but not a release after. Hob. 39. Co. L. 283.

CHAPTER VIII.

Of *Quare Impedit*.

A *QUARE IMPEDIT* is a possessory action, for which reason the plaintiff must shew an actual seisin, which in general must be by alledging a presentation in himself, or in some person under whom be claims; though there may be cases in which that is not necessary, as where a man recovers in a writ of right of advowson, and has execution. So where it is a new created advowson to which there has been no presentment. And where a presentation is necessary to be shewn, that of a grantee of the next avoidance, or of a tenant at will, is a sufficient title for the patron in fee to have this writ. However, this defect of not setting out a presentment will be aided by a verdict, where it was necessary for the plaintiff to prove it in order to prove the issue; for it is not a defect of title, but a title defectively set out. Str. 1006. Rex v. Ep. Landaff. 2 R. A. 378. F. N. B. 33 H. Ro. Ab. 377. 5 Co. 97. Rex v. Ep. Landaff.

By *Westminster* 2. *c.* 5. If a stranger usurp upon an infant claiming by descent, or upon tenant for life, by the curtesy, in dower, in tail, or upon tenant for years by demise of the ancestor, the heir shall not be put to his writ of right, but on the next avoidance may present, or if he be disturbed bring his *quare impedit*, in which he must lay the last presentation in his ancestor, 6 Co. 48. b. Hob. 240.

ancestor, and skip over the usurpation, for by the statute that is to be counted as none to this purpose; but if one usurp on an infant heir who comes of age within six months, if the heir remove not the incumbent by suit, he is out of the statute. The infant in such case cannot grant the advowson, because he has but a right; for in this point the statute has made no change, but has left the possession with the usurper, only has given the usurpee a readier action.

Fitz. Q. Imp. 67.

By the 7 *An. c.* 18. It is enacted, That no usurpation upon any avoidance in any church, *&c.* shall displace the estate or interest of any person, but he may present, or maintain his *quare impedit* upon the next or any other avoidance (if disturbed) notwithstanding such usurpation. And if coparceners, jointenants or tenants in common, make partition to present by turns, each shall be adjudged to be seised of his separate part to present in his turn.

If the issue be found for the plaintiff, the jury are to enquire, first, whether the church be full; secondly, upon whose presentment; thirdly, how long since it was void; fourthly, the yearly value; which being found, damages are to be given according to *Westmin.* 2. *c.* 5. before which no damages were allowed; but by that statute, if six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded to two years value of the church, and if six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the half year's value of the church.

3 Lev. 59. 2 Inst. 362.

Note; The plaintiff shall recover no damages where the church remains void, and if the jury tax damages, a *remittitur de damnis* must be entered. The damages are to be recovered against the disturber, and therefore if the incumbent counterplead the title of the plaintiff as well as the patron, the plaintiff shall recover the value as well against him as against the patron. But no damages shall be recovered against the bishop, where he claims only as ordinary. The king is not within the statute, because by his prerogative he cannot lose his presentation.

6 Co. 52.

By *Westminster* 2. *c.* 30. The judge of *Nisi Prius* has power to give judgment immediately; yet if he do not, upon the return

turn of the *postea* judgment may be given by the court to which the return is made.

If a retainer as chaplain to a person of quality be necessary to be proved, evidence of a copy of the retainer entered in the court of faculties is not good, but the oath of any person who has seen the retainer under the hand and seal of the person of quality, is good. Lit. Rep. 1.

If the ordinary be not named, he may present by lapse, if the six months incur *pendente brevi*; but being named he cannot take advantage of any lapse; and as he is bound, so the metropolitan and the king are bound. Cr. J. 93.

The rule, that when the bishop is named in the *quare impedit*, he shall not present by lapse, is to be understood with some restriction, *i. e.* that there has been an actual disturbance before the action brought, for else the bishop shall not be ousted of his right of presentation by lapse. Hob. 201.

The course to stop strangers from presenting *pendente brevi*, is to sue a *ne admittas* to the bishop, and if the bishop then admit the clerk of any other hanging the suit, and the plaintiff recover, he shall have a *q. incumbravit*, and thereby remove such person so admitted, and put him to his *q. impedit*. But if he sue not a *ne admittas*, if the incumbent of a stranger come in by good title *pendente brevi*, he shall bar him in a *sci. fa.* and shall hold it, and therefore, if the jury find the church full by the presentment of a stranger, a writ shall not be awarded to remove the incumbent without a *sci. fa.* first sued out. Cr. J. 93.

By the 21 *H.* 8. *c.* 13. *f.* 9. If any person having one benefice with cure of souls, of the yearly value of 8 *l.* accept and take any other with cure of souls, and be instituted and inducted in possession of the same, the first benefice shall be adjudged to be void. 4 Co. Digby's case.

By the institution to the second benefice, the first is void by the ecclesiastical law, and therefore the patron may take notice and present, yet no lapse will incur without notice until six months after induction, and that only in cases within the statute. Hob. 166.

By 13 *El. c.* 12. No title to present by lapse shall accrue upon any deprivation, but after six months after notice of such deprivation given by the ordinary to the patron. The law is the same upon a resignation: but in case of death no notice is necessary. 2 Codex 869. Keilw. 49. b.

K Note;

2 Inft. 361.

Note; The computation is to be according to the calendar and not the lunar months, and the day the church became void is to be taken into account.

Bp. of Meath. v. Ld. Belfield, Tr. 21 G. 2.

Where the inftitution takes no notice of whofe prefentation, it has been faid that the party may give evidence of general reputation; for a prefentation may be by parol, and what commences by parol may be tranfmitted to pofterity by parol, and that creates a reputation; yet as it is a fingle fact which is not the fubject of notoriety, fuch evidence feems to be mere hearfay; and it differs from the cafe of proving a marriage, for there the reputation arifes from the cohabitation; fo of the retainer of a chaplain, from his acting as fuch; fo of filiation, &c.

1 Barnes 2. Such a commiffion directed to the prothonotaries.

By 12 *Ann. c.* 14. Papifts are difabled to prefent to any benefice, and the right of prefentation is given to the univerfities; and the ftatute enacts, that where any *quare impedit* is brought either by or againft the univerfity, the court may upon motion make a rule, requiring fatisfaction upon the oath of fuch patron and his clerk (who fhall conteft the right of the univerfity) by examination in open court, or by commiffion, or by affidavit, in order to difcover any fecret truft or fraud relating to the prefentation in queftion; and if it appear that the patron is a truftee, he fhall difcover for whom, and the court may order the *ceftui que truft* to appear and make the declaration, &c.

By 3 *H.* 7. *c.* 10. If the defendant bring a writ of error, and judgment be affirmed, the plaintiff fhall recover his cofts and damages for his wrongful delay.

Cr. J. 145. 175.

By virtue of this ftatute, the court of *king's bench* have, upon a writ of error, awarded damages according to the value of the church found by the verdict: But as the real damages which the plaintiff fuftains, is only the being kept out of the half year's value, the legal intereft on that feems to be all he is entitled to.

2 Str. 931.

PART II.

Containing ONE BOOK.

Of Actions founded upon Contracts.

INTRODUCTION.

MUTUAL commerce and intercourſe is of the very eſſence of ſociety; but if there were no method of compelling the faithleſs to keep their engagements, ſelf-intereſt is ſo prevalent, that very few would be adhered to, and conſequently very few made. Thus the chief advantage of ſociety would entirely fail, unleſs its laws were ſo framed as to bind its members to a ſtrict performance of their contracts, by compelling them to make an adequate ſatisfaction for the breach of them.

Hence ſprings a new ſet of actions very different from thoſe treated of in the firſt part of this work, and they are actions founded upon contract: Such are actions of

1. Account.
2. Aſſumpſit.
3. Covenant.
4. Debt.

CHAPTER I.

Of Actions of Account.

THE action of account is of late years but rarely used, therefore I shall say very little upon it. At common law it lay only against a guardian in socage, bailiff or receiver, and in favour of trade between merchants. The 13 *Ed.* 3. *c.* 23. gave it to the executors of a merchant; the 25 *Ed.* 3. *c.* 5. to the executors of executors, and 31 *Ed.* 3. *c.* 11. to administrators. And now by the 3 & 4 *Ann. c.* 16. it may be brought against the executors and administrators of every guardian, bailiff and receiver, and by one jointenant, tenant in common, his executors and administrators against the other, as bailiff for receiving more than his share, and against their executors and administrators.

Jaggard v. Flitt, Hil. 26 & 27 Car. 2. B. R.

If the plaintiff in his declaration say not by whose hands, if the defendant demur specially he will have judgment; for if it were by the hands of the plaintiff, the defendant may wage his law, *aliter* if it were by another's hands.—It seems this must be understood of cases where the defendant is charged as receiver only; for if he be charged as bailiff, it is not necessary to shew by whose hands.

Com. 272.

Hob. 36.

In account against one as receiver by the hands of *A.* a receipt by his hands ought to be proved. But if he prove that *A.* directed the defendant to borrow of another to pay the plaintiff, and that the defendant borrowed the money accordingly, that is sufficient.

2 R. A. 683. F. 1 Brownl. 24.

If the defendant plead *ne unques receiver*, he cannot give a release in evidence, neither can he give in evidence bailment to deliver to *B.* and that he has delivered accordingly: for though this special matter prove he is not accountable, yet as upon the delivery he was accountable conditionally, (*viz.* if he did not deliver over) it does not prove the plea; but if the defendant plead he accounted before *R.* and *W.* evidence that he accounted before *R.* only is sufficient, because the account is the substance.

Cr. Car. 116.

In the action of account there are two judgments; the first is *quod computet*, after which the court assigns auditors, before whom

whom nothing shall be allowed as a good discharge, which might have been pleaded to the action.

If the defendant plead any matter in discharge before the auditors, which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who will thereupon award a *ve. fa.* to try it; and if on such trial the plaintiff make default, he shall be nonsuited, but after that he may bring a *sci. fa.* upon the first judgment.

Note; The defendant cannot in this action pay money into court, as he may in *assumpsit*. Per Willes Ch. J. Tr. 27 G. 2.

CHAPTER II.

Of Assumpsit.

OF all actions founded upon contract, none is in more general use than the action of *assumpsit*, which is founded upon a contract either expressed or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract.

There are two sorts of *assumpsit*. First, a general *indebitatus assumpsit*. Secondly, a special *assumpsit*. Cr. J. 206. 1 R. A. 8. Hut. 35.

Indebitatus assumpsit will not lie where the debt is due by specialty, for in such case the specialty ought to be declared upon; therefore it is always necessary in this action to shew for what cause the debt grew due; and in case it be not shewed, it will be sufficient reason to arrest judgment, or to reverse it upon a writ of error.

The general causes for which this action may be brought, are either, first, for money lent. Secondly, for money laid out and expended. Thirdly, for money had and received to the plaintiff's use. Fourthly, for a sum certain (*viz.* 10*l.*) for goods sold and delivered. Fifthly, for goods sold *quantum valebant*. Sixthly, for a sum certain for work and labour. Seventhly, a *quantum meruit* for work and labour. Eighthly, on an account stated.

May and King, Ca. K. B. 537.

And the plaintiff's proof ought to tally with some of the counts in the declaration, and therefore if in an action for work and labour and money lent, the evidence were that there had been mutual dealings between the parties, and that they had come to an account, and that the defendant upon the balance was indebted to the plaintiff, (*ex. gr.* 5 *l.*) and had promised to pay, the plaintiff ought to be nonsuited, unless there were likewise a count upon an *insimul computasset.*

Thompson v. Spencer, B. R. East. 8 G. 3.

Note; till within these few years it was a general received notion, that on a count upon an *insimul computasset*, the plaintiff was obliged to prove the exact sum laid: but this idea is now exploded, and the plaintiff may now recover part of the sum laid on this count, as well as on any other.

Gardner v. Crosdaile, B. R. Hil. 33 G. 2.

So in an action on a policy of insurance, though the plaintiff declare for a total loss, he may recover for a partial loss only; though this seems to have been holden otherwise formerly.

1 Show 215.

In *assumpsit* upon an account stated, proof that the defendant and the plaintiff's wife reckoned that the defendant had borrowed at one time 40*s.* at another time 40*s.* and at another time 4*l.* and that this came to 8 *l.* and that he promised to pay it, is good evidence. And yet in such case no confession of the wife's would be allowed to be given in evidence against the husband.

Upon an *indebitatus assumpsit* against several, a joint debt or contract must be proved; for it is different in contracts from what it is in torts, which are several, and in which one alone may be found guilty.

There must be either an express or implied promise to found this action upon.

Bell v. Burrows, C. B. East. 5 G. 3.

A private act of parliament gave power to commissioners to divide common fields, and to make such orders and regulations as they should think fit; they awarded that all proprietors of land allotted to them which had been ploughed or manured, since any corn had been reaped, should pay to the person who had manured or ploughed it, 4 *s.* an acre. General *indeb. assumpsit* lies for this.

Watson v. Turner and another, Scacc. Trin. 7 G. 3

An action was brought by an apothecary against the overseers of a parish for the cure of a pauper, who boarded with her son out of the parish, under an agreement made with him by

by the defendant *Turner*, who as the only acting overseer of the parish. The pauper was suddenly taken ill, and her son called in the plaintiff who had attended her for four months, and cured her. After the cure *Turner* was applied to, and promised to pay the plaintiff's bill. It was held that though there was no precedent request from the overseers, yet the promise was good, notwithstanding the statute of frauds; for overseers are under a moral obligation to provide for the poor. 2dly, That as *Turner* was the only acting overseer, the other was bound by his promise.

If the defendant be under an obligation from ties of natural justice, it implies a debt, and gives this remedy founded upon equity, *quasi ex contractu*; as suppose a recovery on a policy on a ship presumed lost, which afterward appears to be safe. But in *assumpsit* for goods sold, if the evidence be that the defendant has agreed with the plaintiff's servant to pay him half price, which the servant is to have to his own use, this will not maintain the action, for here arises no contract to the plaintiff; he might as well bring *assumpsit* against one who steals his goods. But where a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last the promise will be presumed to be made to him, and the rather so, as it is so much for the benefit of trade.

Moses v. Macfarlane, P. 33 G. 2. K. B.

Thorp and How, H 13 W. 3. at Westminster, per Holt, Salk. MSS.

Gonzales v. Sladen, 1 T. An. Guildhall, Salk. MSS.

However, a factor's sale does by the general rule of law create a contract between the owner and buyer, and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer would not be justified in afterwards paying the factor. Yet perhaps under some particular circumstances this rule may not take place: As where the factor sells the goods at his own risque; (*i. e.* is answerable to the owner for the price, though it be never paid) for in such case he is the debtor to the owner, and not the buyer.

2 Str. 1182.

The defendant was nurse to the plaintiff's *intestate*, and when he died went off with the money he had about him; and *per Parker* Ch. Just. an action will well lie for money had and received to the plaintiff's use; for (he said) he would presume a subsequent agreement to make a contract of it; and the bringing the action is an admission of such consent.—And he said, he knew but of two cases where the plaintiff had not such

Thomas and Whip, Tr. 1 G. 1.

 election,

election, the one was in case of money won at play, and the other in case of money paid by a bankrupt (though on valuable consideration) after the act of bankruptcy committed; in either of which cases the action *must* be trover, for you cannot confirm the act in part, and impeach it for the rest. And Lord *Hardwicke* (mentioning this case) said he always so held it, and had nonsuited many plaintiffs in actions of *assumpsit* under such circumstances.

Kitchin and others, assignees v. Campbell, C. B. 11 G. 3.

However, where goods were sold under an execution after an act of bankruptcy committed, the assignees recovered the money for which they were sold, in an action for money had and received, after solemn argument.

Feltham v. Terry, B. R. East. 13 G. 2.

The defendant levied money by seizing and selling the plaintiff's goods, on a justice's warrant founded on a conviction; which conviction was afterwards quashed; and it was holden that an action for money had and received then lay for the clear money produced by the sale of the goods.

Stra. 406.

On a contract for stock, the party who has the difference in his hands, is receiver of so much to the other's use.

Str. 407.

Where money is paid, and the thing contracted for not delivered, it is money received to his use.

Simpson and Gisling, at Rochester.

In *assumpsit* for money received to the plaintiff's use, proof that a lamb of his was driven to *London*, and sold there by the defendant, will be sufficient, unless it appear to have been stolen, for then trover would be the only proper action.

Str. 1027.

Assumpsit will not lie for money had and received, where the defendant has entered into articles to account, for then the plaintiff has a remedy of an higher nature.

Salk. 12.

If a sheriff levy money upon a *fi. fa.* the plaintiff or his executors may have *indebitatus assumpsit* for so much money received to his use.

Oct. Str. 69, 70.

A. paid *B.* 100*l.* for a bill of exchange on a banker, who broke before it could be tendered, and he was allowed to recover back the money in an action for money received to his use.

Campden and Turner, Tr. 5 G. 1. per King, Ch. J. Midd.

So for a legacy, where the executor owned it lay ready for the plaintiff whenever he would call for it.

Salk. 22. Tomkins and Bernet.

Where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, he may bring *indebitatus assumpsit* for the money: but where one knowingly pays money upon an illegal consideration, he is *particeps criminis*, and there is no reason he should have his money again, for he parted with it freely, and *volenti non fit injuria.*

In

In such case *melior est conditio defendentis*, not because the defendant is more favoured, but because the plaintiff must draw his justice from pure fountains. Therefore though if *A.* agree to give *B.* money for doing an illegal act, as if a wager be made on a boxing match, *B.* cannot (though he do the act) recover the money by an action; yet if the money be paid, *A.* cannot recover it back again. Moses and Macfarlane. Webb v. " shop, Gloucester Lent Ass. 1731. cor. Reynolds C. B.

So if a debt contracted during infancy be paid, or if money be paid which was fairly won at play: But where the plaintiff has paid money on a consideration not performed, (*ex. gr.* of transferring stock at a day certain) he may either affirm the agreement by a special action on the case for the non-performance, or disaffirm it by reason of the fraud, and bring an action for money had and received; in which case the jury ought to make the price of the stock at the time it should have been delivered, the measure of the damages. However, he could not in such action recover more than the money he had paid. The law would be the same though the condition were illegal, for not being performed, the defendant is under an obligation from ties of natural justice, to repay the money: Therefore where *A.* gave a custom house officer money to run goods, the goods being seized, *A.* recovered his money back again. Dutch and Warren, Mic. 7 G. 1. C. B. 1 Raym. 89.

Where the plaintiff having pawned plate to the defendant for 20*l.* at the end of three years came to redeem it, and the defendant insisting to have 10*l.* for interest, the plaintiff tendered 4*l.* being more than legal interest, which the defendant refusing, and insisting on the 10*l.* the plaintiff paid it and had his goods, and brought his action for the surplus beyond legal interest; on a case made, the court held that the action well lay, for that it was a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business, and the rule *volenti non fit injuria* holds only where the party had his freedom of exercising his will. In the case of *Tomkins* and *Bernet*, the party has not paid more than was really lent, therefore had no equity to have his money repaid, though the bond which he gave for it had been avoided by another obligor pleading the statute of usury: But if a person under the influence of his creditor pay more than legal interest, he may recover it back; for the defendant is under a moral tie to return it. Str. 915. Ante.

The

Smith v. Bromley, coram Mansfield 1760.

The plaintiff's brother being a bankrupt, an agent for one of the creditors told her that for money his client would ſign the certificate: She gave 40*l.* the certificate was ſigned; ſhe brought *aſſumpſit*, and recovered.

1 Salk. 27.

A. took out adminiſtration to *B.* and appointed *J. S.* his attorney, who received money and paid it to the adminiſtrator; afterwards a will appearing, the executor brought an *indebitatus aſſumpſit* againſt the attorney; and it was holden by *Trevor* Ch. Juſt. at *Guildhall*, that the authority being void, it was a receipt for ſo much money for the uſe of the plaintiff on an implied contract, for which *indebitatus aſſumpſit* well lies.

1 Raym. 742.

Where money is paid in purſuance of a void authority, *indebitatus aſſumpſit* will lie, as where Sir *Richard Newdigate* was decreed by the high commiſſion court in *James* the Second's time, to pay arrears to *Davy*, whom he had removed from a donative.

Staplefield and Yewd. Tr. 27 G. 2. coram Lee Ch. J.

But where a man receives money for another under a pretence of right, (*ex. gr.* for tithe) the court will not ſuffer the principal's right to be tried in ſuch an action againſt the collector, if the defendant can ſhew the leaſt colour of right in his principal: As (in the caſe put) by having been for ſome time in poſſeſſion.

Sadler v. Evans, B. R. Tr. 6 G. 3.

A. as agent of *W.* received money for quit-rents due to *W.* and gave a receipt for it as ſuch; Then an action for money had and received was brought againſt *A.* to try *W.*'s right to the quit-rents; and it was holden that the action would not lie againſt him, but ought to have been brought againſt *W.* But if *A.* had had notice not to pay it over to *W.* becauſe it was not due, and then he had paid it over, the action would have lain againſt him.

Salk. 28.

In *aſſumpſit* for money had and received to the uſe of the plaintiff, proof that the defendant was a married man, and pretending to be ſingle had married the plaintiff, and made a leaſe of her land and received the rent, would be ſufficient to maintain the action. For though the defendant not having a right to receive, the tenants were not diſcharged by his receipt, yet the recovery in this action will diſcharge them.

1 Vent 318. 332. Sir Tho. Jones 103.

The caſe of *Dutton* and *Poole* is very remarkable to ſhew how far the law goes in giving this action to the party intereſted. There the plaintiff declared, that his wife's father being ſeiſed of land now deſcended to the defendant, and being about to cut down 1000*l.* worth of timber for his daughter's portion, the defendant

defendant promised the father, in consideration that he would forbear to sell the timber, that he would pay the plaintiff the daughter 1000*l.* After verdict for the plaintiff upon *non assumpsit*, it was moved in arrest of judgment that the action would not lie for the daughter, but ought to have been brought by the executors of the father. But the court said it might have been another case, if the money had been to be paid to a stranger, but it is a kind of debt to the child to be provided for, and therefore affirmed the judgment. Yet in the case of *Pine* and *Morris* where the son promised the father, that in consideration that he would surrender a copyhold to him, that he would pay a certain sum to his sister, for which she brought the action, it was holden that it would lie for none but the father; and the reason given is, that where the party to whom the promise is to be performed, is not concerned in the meritorious cause of it, he cannot bring the action. And therefore where the plaintiff declared, that whereas *P.* was indebted to the plaintiff and defendants in two several sums of money, and that a stranger was indebted to *P.*, the defendants, in consideration that *P.* would permit them to sue the stranger in his name, promised to pay the sum *P.* owed the plaintiff, and alledged that *P.* permitted, and they recovered; after verdict for the plaintiff judgment was arrested, because the plaintiff was a mere stranger to the consideration; but a case being then cited of a promise made to a physician, that if he did such a cure he would give such a sum of money to himself, and another to his daughter, in which it was resolved the daughter might bring an *assumpsit* for the money, the court agreed to it, and said the nearness of the relation gave the daughter the benefit of the consideration performed by her father.

Cited in Sir Th. Jones.

1 Vent. 6.

And perhaps in these days the other cases would receive a different determination, as the courts have been more liberal than formerly in extending the benefit of this action.

As this action may be brought upon an implied promise, it will be proper to see how far and in what cases a husband is liable on his wife's contracts; and the reason why a husband shall pay debts contracted by his wife, is upon the credit the law gives her by implication in respect of cohabitation, and is like credit given to a servant, and therefore where they part by consent, and an allowance is made her, it is presumed that she is trusted on her own credit, and her husband is discharged;

Todd and Stokes, 8 W. 3. at G Hall. Ca. K. B. 244. S. C. 1 Raym. 444. S. C.

charged; therefore where the plaintiff, who was an apothecary, ſued the defendant who lived in *Chicheſter* for phyſick adminiſtered to his wife in *London*, who had been parted by conſent for five years, and on ſeparation articled to allow her 20*l. per annum*, which he accordingly did, and it appeared that the plaintiff did not know her to be a feme covert at the time when the medicines were given; *per Holt*, if huſband and wife part by conſent, and the huſband ſecure her an allowance, it is in conſideration that he ſhall not be charged any more by her, and a perſonal knowledge is not neceſſary, ſo it be publicly known, and ſuch public notification need not be at *London*, where the debt was contracted, but it is ſufficient if it be where the parties lived, *viz.* in this caſe at *Chicheſter*; but if the debt were contracted in ſo ſhort a time after the agreement, as that it could not be known at *London*, the huſband would be liable.

But if the huſband turn away the wife, he ſends credit with her for reaſonable expences; to which purpoſe the caſe of *Bolton* and *Prentice*, *M.* 18 *G.* 2. *B. R.* is very ſtrong: The defendant and his wife lodged at the plaintiff's houſe, who was a millener, during which time ſhe furniſhed the wife with many things, without the privity or conſent of her huſband, which however he paid for, but forbade the plaintiff to truſt his wife any more: About twelve months after the defendant turned his wife out of doors, who went to the plaintiff, and was by her furniſhed with apparel ſuitable to her degree; and for this debt the plaintiff brought the action, and had a verdict; and upon motion for a new trial it was denied; for when a man turns away his wife, he gives her a general credit, and the prohibition is gone and ſuperſeded. But if the wife elope from her huſband, he ſhall not be liable though the tradeſman who truſts her has no notice of the elopement.—It is ſufficient for the huſband to give general notice that tradeſmen, &c. ſhould not truſt his wife. Though the huſband and wife cohabit, yet he may forbid any particular tradeſman to truſt her, and ſuch prohibition to the tradeſman's ſervant is ſufficient.

Longworth and Hackmore, Exon 10 W. 3. per Holt. Salk. MSS. Str. 113. Salk. 118.

Where an ordinary working man married a woman of the like condition, and after cohabitation for ſome time left her, and during his abſence the wife worked; an action being brought for her diet, Lord Ch. Juſt. *Holt* held, that the money ſhe earned ſhould go to keep her.

1 Salk. 118.

In

In an action for meat found and provided for the defendant, Lord *Raymond* held that the plaintiff could not give evidence of meat found for the defendant's wife who lived separate from him, but the plaintiff agreeing not to bring another action, he left it to the jury. Harris and Collins, Tr. 12 G. 1. Str. 127. S. P.

But where the plaintiff declared that the defendant was indebted for meat, *&c.* found by the plaintiff at the defendant's request; and on evidence it appeared to be found for the defendant's wife at his request in his absence; upon a case reserved it was holden, that a delivery to the wife at the husband's request, is in law a delivery to the husband; though it was said that it would be wrong in the case of a third person. Ross and Noel, E. 31 G. 2. C. B.

Before I quit this point it may be necessary to observe, that even cohabitation is only evidence of an assent of the husband, and therefore in a special verdict the jury ought to find the assent, and not the cohabitation. So they ought to find the goods necessary and convenient for the husband's estate as well as degree, for a high degree may have a low estate. Manby and Scot, 1 Lev. 4.

The plea of *ne unques accouple in loyal matrimonie*, is good only in dower and appeal; and if pleaded to an action on the case for a debt contracted by the wife, on demurrer the plaintill will have judgment. Norwood and Stevenson, Tr. 11 & 12 G. 2. K. B.

Having seen how far the husband is liable to pay the wife's debts, it may not be improper to shew how far he may be benefited by her contracts, and he is intitled to whatever she earns during the coverture, and therefore he alone must bring *assumpsit* for work and labour done by his wife, the promise in law being made to him; but if there be an express promise to her they may join. Salk. 114. Cr. J. 77.

Where a woman married a second husband, living the first, and the second not privy. As to what she acquires by her labour during cohabitation, the second husband will be entitled to it, as she will be esteemed a servant to him. Strutville v. ——, M. 4 G. 2. per Parker C. J. Oct. Str. 38. Str. 1094.

In an action for wages earned by the wife, *Lee* Ch. Just. refused to let the wife's confession of a receipt of 20*l.* be given in evidence.

Case upon four several promises, one of which was upon a promissory note, to which the defendant demurred, and the plaintiff had judgment; to the other three counts he pleaded *non assumpsit*; at the trial the plaintiff would have rested his case upon the count for money lent, and offered the note in evidence; Randulph v. Regendo, P. 1 G. 2.

dence; but *Eyre* Ch. Juft. would not allow it, becaufe that would be to charge the defendant twice for the fame note; the plaintiff then would have given evidence of goods fold and delivered, which was likewife refufed, it appearing that the note was given for the fame goods.

Story and Atkins, M. 13 G. 1. Str. 719.

However, in common cafes upon *affumpfit* for money lent, the plaintiff may give a promiffory note from the defendant in evidence, for the 3 & 4 *Ann.* *c.* 9. which enables the plaintiff to declare upon the note, is only a concurrent remedy.

Hollingworth v. Thompfon, G. Hall, 1752, per Dennifon.

Affumpfit upon a note of hand, dated the 10th of *September*, payable two months after date, the memorandum was general of *Michaelmas* term; and upon objection taken that the fuit was commenced before the caufe of action accrued, the plaintiff was nonfuited; *fed quære*, for in *Proger*'s cafe, 2 *Sid.* 432. on a trial at bar, where the declaration in ejectment laid the leafe to be dated after the firft day of *Michaelmas* term, and the declaration was of the fame term, it was holden to be matter of evidence when the bill was filed, for if the bill was in fact filed after the day of the fuppofed leafe, all is well. So in *Dobfon* and *Bell*, 2 *Lev.* 176, in trover, the converfion was laid to be on the firft day of *Eafter* term, and the declaration was of the fame term; verdict for the plaintiff and motion in arreft of judgment; but upon making it appear that the bill was filed, and declaration delivered after the firft day of the term, judgment was entered without any amendment, for though the declaration being general relates to the firft day of the term, yet the bill being filed at a day after, all relates to the filing of the bill by the courfe of the court. So in *Tatlow* or *Caftle* v. *Bateman*, 3 *Lev.* 13. upon like motion in trover the court faid, it was well enough if the bill were filed after the caufe of action accrued, for no action can be depending, nor declaration delivered, until the defendant be *in cuftodia marefc.* and that is never till bill filed, and it was referred to the fecondary to examine when the bill was filed. Yet in *Venables* and *Daffe*, in an action for a malicious profecution, where the day of acquittal was laid to be after *Michaelmas* term began, and the memorandum was general of *Michaelmas* term; on motion the judgment was arrefted; but there it was not fhewed that the bill was filed after the firft day of the term.

Carth. 113.

Morris v. Harwood and Pugh. Mich. 2 G. 3.

In trover the declaration was of *Eafter* term, which began 8th *April*, the demand was the 9th *April*, but the plaintiff proving

ing that the writ was not taken out till 2d *May*, he obtained a verdict; and on a case stated the court held that he should not be prevented by the fiction of relation from shewing the real truth of his case.

The defendant was arrested, and the writ returnable before the cause of action accrued, but the declaration was specially intitled of a day in term subsequent to the time when the cause of action accrued. *Per* Lord *Mansfield*, unless the plaintiff particularly make the writ the commencement of his suit, it is only to be considered as process to bring the defendant into court; and the record being specially intitled of a day in term, that must be considered as the day on which the bill was filed, and the time of the commencement of the suit. So the plaintiff had a verdict. G. Hall, Tr. 1771.

At common law it was holden that *assumpsit* would lie for rent on an express promise, but not upon an implied promise, and such express promise must have been made at the same time with the lease.—But now, 2 Lev. 150.

By 11 *G*. 2. *c*. 19. Where the agreement is not by deed, the landlord may bring case for the use and occupation; and if in evidence any parol demise or any agreement (not being by deed) whereon a certain rent is reserved, do appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered. And by the same act, if the tenant for life die before or on the day on which any rent was made payable, upon any lease which determined on the death of such tenant for life, his executors may in an action on the case recover the whole, or a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, in which the said rent rent was growing due.

An executor brought an action for rent due to his testator in his life-time, and for other rent due in his own time, and there was another count on a *quantum meruit* for the rent of another messuage, in which he had not declared as executor. After judgment by default and a writ of enquiry executed, upon error brought, judgment was reversed, because the demands were incompatible; but perhaps it would have been helped by a verdict, because for rent due in his own time he need not declare as executor, and therefore if it had been tried, the judge ought not to have permitted him to prove rent due to himself in his own right. Str. 1271.

In

Lewis and Wallace. H. 25 G. 2. K. B.

In case for use and occupation of an house by permission of the plaintiff the defendant pleaded *nil habuit in tenementis*; and upon demurrer the court held it not a good plea, as it would be upon a lease at common law, because there an interest is supposed to have passed from the lessor, but here the court must take it that there was an express promise, and therefore if the plaintiff had an equitable title, or no title at all, yet if the defendant have enjoyed by permission of the plaintiff, it is sufficient, and it is not necessary for the plaintiff to say it is his house, any more than in *assumpsit* for goods sold, to say they were the goods of the plaintiff.

Weaver and Borrows, Mic. 12 G. 1. per Raym.

If a man declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he cannot recover on either count, not on the first, because of the variance, nor on the second, because there was a special agreement. But if he prove a special agreement and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*, for otherwise he would not be able to recover at all: As if in a *quantum meruit* for work and labour, the plaintiff proved he had built a house for the defendant, though the defendant should afterward prove that there was a special agreement about the building of it, *viz.* That it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement, yet the plaintiff would recover upon the *quantum meruit*, though doubtless such proof on the part of the defendant might be proper to lessen the *quantum* of the damages. And perhaps in the first case put, the plaintiff ought to have been suffered to recover, if there had been a count on an *indebitatus assumpsit*; for though an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed; yet when that is done it raises a duty for which a general *indebitatus assumpsit* will lie.

Mr. Keck's Case at Oxon. 1744.

Gordon and Martin, Fitz. 302.

Harris v. Oke, at Winchester Sum. Ass. 1759.

And this point now seems to be so settled: for in an action where the plaintiff declared on a special agreement, and also on a general *indebitatus assumpsit*, the plaintiff failed to prove his special count; and then it was objected that he ought not to be allowed to enter into proof of the general count: but Lord *Mansfield* suffered him to go into such proof; and the next day his Lordship declared in court, that he had asked Mr. Justice *Wilmot* (who was then with his Lordship on the circuit) his opinion

opinion on a case of this kind, which happened before him at *Launceston* assizes, and which had been mentioned on the occasion; who said he did not recollect that particular case, but that the circuit practice, according to his observation, had been on this distinction; when the plaintiff attempted to prove the special agreement, and failed in it, he was not permitted to go on the general *indebitatus assumpsit*. But his Lordship said, he did not approve of that distinction, and that his opinion after the consideration he had given it was, that where the evidence is sufficient to warrant the plaintiff's action on the general count, supposing no special agreement had been laid in the declaration, the plaintiff should be permitted to recover on such general count, though there be a special agreement laid; whether he attempts to prove such special agreement or not: And that Mr. Justice *Wilmot* intirely concurred in this opinion.

Upon an *assumpsit* against an executor or administrator, the plaintiff must prove his debt, though the defendant have pleaded *plene administravit*; for by that plea, though a debt be admitted, yet the *quantum* is not; and therefore it differs from debt in which the plea of *plene administravit* is an admission of the debt, and therefore it need not be proved. Salk. 296. 1 Show. 81.

The plaintiff cannot upon this issue give in evidence a copy of an inventory delivered by the defendant to the spiritual court, unless it be signed by him, though it be signed by the appraisers; but he may give evidence by witnesses, that the defendant had assets, or if he give an inventory in evidence, he may shew the goods were under-valued, (Note, a leasehold estate not sold is *assets ad valorem*: and assets in *Ireland* are assets here.) If in the inventory produced, the article concerning debts did not distinguish between sperate and desperate, it would be sufficient to charge the executor with the whole *prima facie* as assets, and put it upon him to prove any of them desperate, as if the article were, "*Item*, for debts due and owing, which I admit myself to be charged with when recovered or received." Welbourne and Dewsbury, per Eyre Ch. J. H. 12 G. 1. Post. 1 Barnes 240. Cr. J. 55. Smith and Davis, M. 10 G. 2. Mid. per Hardw. Ch. J.

And in the case of sperate debts, the executor may discharge himself by shewing a demand and refusal. Salk. 296.

If assets be proved in his hands, the defendant the executor may give in evidence that he has paid debts to the value, and need not plead it. So he may give in evidence a retainer for his own debt, or that the intestate before marriage with the defendant Co. L. 283.

L dant

Simpson and Tresler, in Kent. 1681, per Weston Bar'.

dant gave a bond to *J. S.* conditioned to leave the defendant 500 *l.* and that she retained to satisfy this obligation. So if administration be granted to a creditor, and after repealed at the suit of the next of kin, the creditor may retain against the rightful administrator; for where administration is granted to a wrong person it is only voidable, but if it be granted in a wrong diocese it is void, and in such case there could be no retainer.

Salk. 39.

Note; If a man have *bona notabilia* in several dioceses of the same province, there must be a prerogative administration; if in two of *Canterbury* and two of *York*, there must be two prerogative administrations, and if in one diocese of each province, each bishop must grant one.

Cro. Eliz. (472.) Godolph. 70. Office of Executor, 46.

Debts due by specialty are deemed the deceased's goods in that diocese where the securities happen to be at the time of his death. But debts by simple contract follow the person of the debtor, and are esteemed goods in that diocese where the debtor resides at the time of the creditor's death.

Bank of England and Morris, 9 G. 2.

The executor, on the plea of *plene administravit*, cannot give in evidence debts of a higher nature subsisting, but must plead them; it will not be improper therefore in this place to consider how they ought to be pleaded. Where the days of payment in the condition of a bond are past, the penalty is the debt, and therefore the ancient method of pleading them was to plead them singly, and set forth the penalty only; but the common way now is to set forth the condition likewise. But where the days of payment were not incurred at the death of the testator, the executor can only plead the sum in the condition, because he may deliver himself from the penalty by performing it; and if he refuse or neglect to do it, it will be a *devastavit*. But where the day of payment is past, though the executor set out the condition in his plea, yet he shall cover assets to the amount of the penalty, unless the plaintiff reply *per fraudem*, and on issue joined thereon, prove that the obligee offered to take a less sum than the penalty, and not more than the executor had to pay. If the testator acknowledge a recognizance, or enter into a statute with condition for the payment of a less sum at a future day, it will be a bar to debts of an inferior kind, though the day of payment be not yet incurred, because it is a present duty, and is on record, on which execution may be taken out without further suit; but a debt due by obligation is only a chose in action, and recoverable by law, and not a present duty as the other is.

If

If the executor plead 20 judgments, he confesses assets for above 19, and yet at his peril he must plead all the judgments, for otherwise if the creditor pray judgment of assets *quando acciderint*, he shall not be allowed for those not pleaded; and if he plead five judgments, and one be false or fraudulent, and so found, he is saddled with the whole debt; so if any one be ill pleaded. Ca. K. B. 496. Salk. 312.

An executor pleaded, that his testator had entred into a statute which remained in force and not paid; upon demurrer, because not averred to be for a just debt, the court held the plea good, for that it should be intended to be for a just debt, and he who will take advantage of the contrary ought to shew it. Cr. J. 35.

In debt for rent, though the lease be by parol and the term determined, a bond outstanding cannot be pleaded in bar, for the contract still remains in the realty. 3 Lev. 267.

If a judgment being pleaded, and *per fraudem* replied, and issue taken thereupon, by evidence it appear the debtee was willing to take less than is recovered, it is evidence of fraud, unless the executor shew that he had not assets to pay the same. Salk. 312.

Where upon the issue of *plene administravit* a verdict is found, that the defendant has assets to part of the debt; yet judgment shall be entered for the whole debt, but the *si non, &c. de bonis propriis* ought to be as to the costs only, and execution ought to be taken out only for so much of the debt, for which the defendant is by the verdict found to have assets. Mary Shipley's case, & Co. 134. Bank of England and Morris, 9 G. 2.

If an executor suffer judgment by default, it is a confession of assets sufficient to pay the debt, and therefore the sheriff may return a *devastavit* to a *fi. fa.* if he cannot find goods of the testator; and if the executor do not plead such judgment and *nul assets ultra* to another action, but admit judgment to go by default, it is a confession of assets as to that likewise. Ca. K. B. 411. Salk. 310.

But a *cognovit actionem* is not a confession of assets. Hob. 178.

Judgment against *B.* in *C. B.* who after judgment enters into a statute and dies, his administrator brings error on the judgment, which is affirmed, and upon a *sci. fa.* to have execution, pleads payment of the statute, and *nul assets ultra*, and it was holden a good plea; for at the time of the execution of the statute he could not plead the judgment in bar, and therefore payment of the statute was no *devastavit*. Yelv. 29.

The sheriff to a *sci. fa.* having returned that the defendant the executor had wasted, he appeared at the return of the writ and pleaded *plene administravit*, and traversed the wast- Ayliff and Ayliff, H. 2 G. 1. C. B.

Ante. ing: On iſſue thereon, the inventory exhibited by the defendant in the eccleſiaſtical court was allowed to be evidence ſufficient to put the executor to ſhew how he had diſpoſed of the goods and money mentioned therein.

In ſtrictneſs, no funeral expences are allowed againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearers' fees, but not for the pall or ornaments.

The uſual method is to allow 5 *l*.

1 Lev. 236. Upon the plea of *ne unques executor* evidence may be given, that the ſeal of the ordinary is forged, or the adminiſtration repealed, or that there were *bona notibilia*, for they confeſs and avoid the ſeal; but evidence that another perſon is executor, or that the teſtator was *non compos*, or that the will was forged, cannot be given, for that would be to falſify the proceedings of the ordinary wherein he was judge.

2 Show. 81. If it be alledged that a ſimple contract debt is paid, the very debt ought to be proved as well as the payment. So if an executor plead *plene adminiſtravit* to an action upon a bond, he muſt prove the debts paid to be on bonds ſealed and delivered. But in an action for a ſimple contract debt on the like plea, proof of payment is ſufficient, for if no bond, it is a good adminiſtration.

1 Raym. 745. Note; In ſuch caſe the creditor may prove his bond, and the debt due upon it, and the payment of it.

Arnold and Arnold, H. 6. G. 2. per Eyre Ch. J. If an executor plead *plene adminiſtravit*, and thereupon iſſue is joined, the defendant has admitted himſelf executor, and therefore cannot ſhew that he only acted as agent for the executor, for then he ſhould have pleaded *ne unques executor*. But if he give in evidence a retainer, the plaintiff cannot object that as executor *de ſon tort* he cannot retain, without ſhewing the will and who are rightful executors.

Yelv. 137. If a man bring an action againſt an executor *de ſon tort*, he muſt declare againſt him as executor of the laſt will and teſtament; therefore if defendant plead a retainer he ought to ſhew that the teſtator made him executor; and it is not enough to ſay that the teſtator made his will, and that he *ſuſcepto ſuper ſe onere teſtamenti* paid divers debts, and retained for a debt of his own. If he ſo plead, the plaintiff may either demur for this cauſe, or reply that he is executor *de ſon tort*. But in ſuch caſe the defendant may rejoin, that *puis darrein continuance* letters of adminiſtration have been granted to him, for ſuch adminiſtration

Atkinſon and Rawſon, M. 17 Car. 2. C. B.

Str. 1106. Andr. 332.

nistration will legitimate all intermediate acts, and justify a retainer.

Executors are no further chargeable than they have assets, unless they make themselves so by their own act, as by pleading a false plea; *i. e.* such a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be false; as *ne unques executor*, or a release to himself. But if he plead a former judgment had against him by another person, and *nil ultra*, and the plaintiff reply *per fraudem*, and it be so found, yet the judgment shall only be *de bonis testatoris*. 1 R. A. 931.

If an executor plead *plene administravit*, and the plaintiff reply that he sued out his original such a day, and that the defendant had assets then; and the defendant in his rejoinder takes issue, that he had not assets then: The plaintiff need not give in evidence a copy of the original to prove the time of its being taken out, because the defendant admits it by his rejoinder. But if the plaintiff reply assets at the time of exhibiting his bill, *viz.* such a day, and conclude his replication to the country; (which in such case he may;) though the plaintiff lay his bill to be exhibited on the first day of the term, if in fact it were exhibited afterward, the defendant shall have advantage thereof on the evidence, so that he shall not be bound for what he paid before. The difference between these two cases depends solely on the manner of the plaintiff's replying; for in the first case, the plaintiff alledged the time of suing out the original, as a distinct positive fact, and concluded with an averment; and so the defendant was at liberty to take issue in his rejoinder, on the time of the original's issuing, or on his having assets: but in the last case, the defendant had no opportunity of putting the time of exhibiting the bill in issue; but was obliged to join in the issue taken by the plaintiff, that the defendant had assets at the day the plaintiff exhibited his bill, and the day mentioned in the replication, being alledged under a *viz.* is totally immaterial. 1 Sid. 431.

On *plene administravit* he may give in evidence, that he was but executor *durante minoritate*, that he paid such debts and legacies, and that he had delivered over the residue of the testator's personal estate to the infant when he came of age, for his power then ceases, and the new executor is liable to all actions. But he will be answerable for as much as he has wasted, and the new executor has his remedy against him;— 1 Mod. 174.

 but

but *quære*, whether he is liable to other men's suits? In 1 *Mod.* 175. it is said he is not, but in 6 *Co. Packman*'s case, and *Latch.* 160. it is said he is, and that seems the most reasonable determination.

Per Holt Ch. J. Pasc. 4 An. Salk. MSS.

If an executor compound with the creditors, and after at the suit of any of them plead *plene administravit*, proof of the composition would be conclusive proof of assets, and the court would not suffer him to give evidence of no assets.

By 2 G. 2. c. 24, No attorney shall maintain any action for fee until one month after he shall have delivered a bill written in a common legible hand, and in the *English* tongue (except law terms and names of writs) and in words at length (except times and sums) subscribed with his proper hand. It has been holden, 1. That this act may be given in evidence on the general issue. 2. That it does not extend to the executor of an attorney. 3. Nor to business done in conveyancing.

Salk. 86. 1 Show. 338. or 3 Jac. 1.

1 Barnes 28.

The court will upon motion stay proceedings till the plaintiff has delivered a bill.

1 Raym. 735.

In a special *assumpsit* the plaintiff must prove his declaration expressly as laid, therefore if the agreement be to deliver merchandizable corn, proof of an agreement to deliver good corn of the second sort is not sufficient: So where the agreement declared upon was to sell the plaintiff all his merchandizable skins, and the agreement produced by the plaintiff, and signed by the defendant was so, yet the agreement of the same date entered in the defendant's book, and signed by the plaintiff, being to sell all his merchandizable calve skins, the plaintiff was nonsuited.

At Salop, 1744.

D. of Rutland v. Hodgson, P. 12 G. 1. per Raym. Ch. J. Payne and Hayes, Oct. Str. 74.

The plaintiff declared upon a promise to pay so much money upon the plaintiff's transferring so much *South-sea* stock; at the trial the note produced appeared to be to pay on a transfer to the defendant or his order; and this was holden to be a variance, and the plaintiff nonsuited. So where the contract declared on was to deliver stock on the 22d of *August*, and upon the trial the entry in the broker's book was a contract for the opening, though it was proved to be notorious that the books were to open the 22d, and the broker swore he took the 22d of *August*, and the opening, to be convertible terms.—But these seem rather to be cases founded on the times to get rid of *South-sea* contracts, than to be relied on as precedents in other cases.

Hob. 105. Cr. J. 18.

A mere voluntary curtesy will not have a consideration to uphold an *assumpsit*, but if such curtesy were moved by a request of the party, that gives an *assumpsit*; and therefore if the plaintiff

tiff declare, that whereas the defendant hath feloniously slain *A.* he required the plaintiff to labour and do his endeavour to obtain the king's pardon; whereupon the plaintiff did do his endeavour, *viz.* in riding, *&c.* and afterward in consideration of the premisses the defendant did promise to pay the plaintiff 100 *l.* it will be good: And note, in such case, if the plaintiff could prove no riding, yet any other effectual endeavours according to the request would serve; and if the consideration were future, that he would endeavour, so that the plaintiff must lay his endeavour expresly; and the defendant would not deny the promise, but the endeavour, he must traverse the endeavour in the general, and not the riding in the special. And this leads me to take notice of a distinction between promises upon a consideration executed, and executory.

In the case of a consideration executed the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in deed acted, it is *nudum pactum.* But if it be executory, the plaintiff cannot bring his action till the consideration performed, and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct in fact. And therefore the plaintiff, when he alledges performance, ought to alledge a place where; and if he do not, the defendant may demur for want of a *venue*.

Ibid.

Salk. 22.

If the consideration be illegal it will not uphold an *assumpsit*; as where the defendant in consideration of 20 *s.* assumed to pay 40 *s.* if he did not beat *J. S.* out of such a close. But the act to be done must appear unlawful at the time, otherwise the promise will not be void. As if *A.* bring *B.* to an inn, and affirming to the host that he has arrested *B.* by virtue of a commission of rebellion, in consideration that the host will keep *B.* as a prisoner for one night, promise to save him harmless; if *B.* recover against the host for false imprisonment, the host may have an action on that promise against *A.*—But where *B.* in consideration that the gaoler would permit *A.* his prisoner to go at large, promised the gaoler to pay the debt, and save him harmless, it was holden a void promise; *vide* to the same purpose *Webb* and *Bishop*, *ante*, and the cases there cited.

2 Lev. 174.

Winch. 48.

Yelv. 107.

Ante 122.

Where the action is brought upon mutual promises, it is necessary to shew they were both made at the same time, or else

Hob. 88.

Salk. 112. it will be *nudum pactum*; and though the promifes be mutual, yet if one thing be in the confideration of the other, a performance is neceffary to be averred, unlefs a certain day be appointed for it; and therefore where *A.* had given *B.* a note for fo much money fix months after the bargain *B.* transferring the ftock, and *B.* at the fame time had given a note to *A.* to transfer the ftock, *A.* praying, &c. *B.* brought an action, and upon *non affumpfit*, *Holt* Ch. Juft. at *Guildhall*, obliged the plaintiff to prove either a transfer, or a tender and refufal, within thefe fix months; and faid that if *A.* had brought an action againft *B.* for not transferring, he muft have proved a payment or a tender.

Cr. J. 127. Where in an *affumpfit* two confiderations are alledged, the one good and fufficient, the other idle and vain; if that which is good be proved it fufficeth; And although he fail in the proof of the other, it is not material, becaufe it was in vain to alledge it; but if both be good, both muft be proved.

Cr. E. 79. Though the promife alledged be proved, yet if it appear to be made on a different confideration than is mentioned in the plaintiff's declaration, it is not fufficient, or if it were made on the confideration alledged, and fome other thing befide.

1 R. A. 23. *Ex nudo pacto non oritur actio*, and therefore if *A.* in confideration that *B.* will make an eftate at will to him, promife to pay, it is a void promife, for *B.* may immediately determine his will.

If in confideration of a thing already done, without my requeft, not for my benefit, and where I was under no moral obligation to do it, I promife to pay money, that is *nudum pactum*, and void. But if I were under a moral obligation to do a thing, and another perfon does it without my requeft, and I afterwards promife to pay, that is good. Therefore where a pauper was fuddenly taken ill, and an apothecary attended her without the previous requeft of the overfeers, and cured her, and afterwards the overfeers promifed payment, it was holden good, for they were under a moral obligation to provide for the poor.

Wattfon v. Turner and Another, Excheq. Tr. 7 G. 3.

Carth. 89. In *affumpfit* the plaintiff declared, that he had delivered goods to the defendant, which he promifed to difpofe of and to give the plaintiff an account, &c. the defendant pleaded in abatement, that he was bailiff to the plaintiff to merchandize the faid goods, and that he ought to bring account; and upon demurrer it was adjudged that here being an exprefs promife

to account, *assumpsit* will lie as well as account, and that wherever one acts as my bailiff he promises to render an account. However upon that occasion, *Holt* Ch. Just. told the plaintiff, that when it came to be tried he would not suffer him to give all the account in evidence, or to enter into the particulars thereof, but that he should direct his proof only as to the damages which he had sustained for not accounting according to his promise. In such cases where *indebitatus assumpsit* is brought for money received *ad computandum*, it is necessary to prove a misapplication or breach of trust; for if a man receive money to a special purpose, it is not to be demanded of the party as a duty, till he have neglected it or refused to apply it according to the trust, and such misapplication or breach of trust ought regularly to be laid in the declaration, but the want of it will be aided by a verdict.

Salk. 9.

Salk. 9.

Where the defendant has no way to come at the knowledge of the performance of the consideration, the plaintiff ought to give notice of it; otherwise where there is a person named, to whom the defendant may resort and inform himself; as if the promise be to pay as much as *J. S.* paid, *quia constat de persona* the plaintiff is not bound to give notice; otherwise if the promise be to pay to the plaintiff as much as he shall have of any other.

Raym. 1128. Cr. J. 432. Hob. 51.

By 21 *Jac.* 1. *c.* 16. This action must be brought within six years after the cause of action accrued; but if the defendant would take advantage of the statute, it is necessary for him to plead it, for he will not be permitted to give it in evidence on the general issue.

If the defendant plead *non assumpsit infra sex annos*, it is sufficient for the plaintiff to prove a promise to pay within six years without any other consideration, for the plea admits a cause of action before the six years. So if the defendant say, "prove "it due and I will pay it," such a promise with a proof of the debt is sufficient, but a bare acknowledgment of the debt, or of the delivery of the goods after the six years, is not in itself a new promise, though it is evidence of one, as a non-delivery on demand is not a conversion in itself, yet is good evidence of a conversion. But in an action by an executor for money had and received to the use of his testatrix, where upon this issue the defendant was proved to say, "I acknowledge the "receipt of the money, but the testatrix gave it to me;" Mr. baron *Clive* directed the jury to find for the defendant: For such

2 Vent. 151.

Heyling and Hasting per 10 Just. Salk. MSS.

Salk. 29 S. C. Carth. 471. 1 Raym. 421.

Owen and Wolley, Salop 1751.

such an acknowledgment could not amount to a promise to pay, when he insisted he was intitled to retain.

Yeo, bart. v. Fouraker M. 1 G. 3. B. R. 3 Burr.

In *assumpsit* on a promissory note, the defendant pleaded *non assumpsit infra sex annos*: And on the trial it appeared that the defendant was surety in the note for *J. S.* and that six years were elapsed since the note was given, but that upon a demand within six years the defendant said, "You know I had not any "of the money myself, but I am willing to pay half of it." The judge was of opinion at the assizes that this promise took it out of the statute, but the jury found for the defendant: And on a motion for a new trial, the court held clearly that the judge was right; that this promise was sufficient; and granted a new trial.

2 Vent. 151. Modern practice is otherwise. Salk. 292. Osman and Bowley H. 12 G. 1. per Eyre.

If there be several defendants, and they plead *non assumpserunt infra sex annos*, proof of a promise by one within six years is not sufficient to charge him, for the action is joint. If the defendant plead *non assumpsit infra sex annos ante diem impetrationis brevis*, and the plaintiff reply *quod assumpsit infra sex annos, viz.* such a day: Upon evidence the plaintiff is not obliged to prove the taking out the original, because there is a particular day mentioned in the replication; but if no particular day be named, the plaintiff must prove the taking out the original.—There seems but very little foundation for this distinction; for though a particular day be named in the replication, yet the plaintiff is not bound to prove a promise on that day.—The manner of pleading to avoid the necessity of proving the original at the trial seems to be mistaken; for to do that the plaintiff should reply that he sued forth his writ on such a day, and that the plaintiff promised within six years of that day, and conclude with an averment; and then the defendant is at liberty to take issue in his rejoinder, on the time of the writ's being sued out, or on the promise being made within six years of the time mentioned, they being alledged in the replication as two distinct facts; and when the defendant takes issue on one of those facts, he admits the other to be true, and consequently it need not be proved.

Ante 137.

Cotes v. Harris & al', Sittings at Guildhall, Tr. 29 & 30 G. 2. Wace v. Wyburn, Tr. 19 G. 3. K. B.

The defendants were executors of the executor of *W. W.* and in an action of *assumpsit*, pleaded *non assumpsit infra sex annos*; the plaintiff replied, that on the 3d *June* 28 *G.* 2. he sued out a bill of *Middlesex* against the defendants, and that the testator in his life-time promised to pay the demand within six years before the bill of *Middlesex* sued out.—The first item in the

the bill whereon this demand arofe, was in 1746, and all the items except the laft were above fix years ftanding before the bill of *Middlefex* fued out. Mr. *Norton* infifted for the plaintiff, that the laft item being within fix years, and this being a current account, never liquidated, fhould draw the former items out of the ftatute: But *Denifon* J. held that the claufe in the ftatute of limitations about merchants' accounts extended only to cafes where there were mutual accounts, and reciprocal demands between two perfons: But if there were only a demand by *A.* againft *B.* in the common way of bufinefs, as by a tradefman on his cuftomer, that cannot be called merchants' accounts: And he was very clearly of opinion that in this cafe, the ftatute was a bar to all demands of above fix years ftanding.

If an executor bring *affumpfit* on a promife made to his teftator, and the defendant plead that he made no promife to the teftator within fix years; if iffue be joined thereon, a promife to the executor within fix years will not maintain the action. Green v. Crane, H. 5 An. B. R. Salk. MSS.

If an executor take out proper procefs within a year after the death of his teftator, if the fix years were not lapfed before the death of the teftator, though they be lapfed within that year, yet it will be fufficient to take it out of 21 *Jac.* 1. *c.* 16. by the equity of *fect.* 4. Cawer and James, Tr. 15 G. 2. C. B.

So if an executor bring *affumpfit*, but die before judgment, and the fix years run, his executor may notwithftanding bring a frefh action, fo as he bring it in a reafonable time, which is to be difcuffed at the difcretion of the juftices upon the circumftances of the cafe. And note; Though *affumpfit* be not within the letter of the provifo of 21 *Jac.* 1. which excepts perfons beyond feas, yet it is within the equity of it; therefore where the plaintiff replied to the plea of *non affumpfit infra fex annos*, that he was beyond fea till fuch a time, after which he brought the action at fuch a day, it will be good. But the plaintiff would not have been excufed by the defendant being beyond fea before the ftatute of 4 & 5 *Ann.* Fitz. 289. Fitz. 81. 1 Show. 98.

Affumpfit in confideration that the plaintiff at the defendant's requeft would receive *A.* and *B.* *ut hofpites* and diet them, the defendant promifed to pay. The defendant pleaded *non affumpfit infra fex annos*, and on demurrer it was holden to be no plea, for it is not material when the promife was made if the caufe of Salk. 422.

of action be within six years, therefore the plea ought to have been *actio non accrevit infra sex annos.*

Cawer and James, Tr. 14 G. 2. C. B. Metcalfe and Burrows, M. 14 G. 2. Lambert v. Whitely, E. 1760. K. B. 1 Raym. 434.

If an action be properly commenced in an inferior court within the six years, and the defendant remove it by *ha. cor.* to the *K. B.* the statute will be no bar though the six years be elapsed before the removal. And note; A *capias* is good without an original, as well as a *latitat* without a bill of *Middlesex.* And a *latitat* sued in the vacation will by fiction of law save the limitation of time, unless the defendant in his rejoinder set out the very day on which the *latitat* issued.—If the plaintiff would take advantage of such process, he must shew that he has continued the writ to the time of the action brought, and must set forth that the first writ was returned: For if the defendant plead *non assumpsit infra sex annos ante exhibitionem billæ* and issue be taken thereupon, he cannot give the *latitat* in evidence; for a *latitat* may either be the commencement of the action, or only process to bring the defendant into court; and as process it may be sued out before the cause of action accrues: As where the defendant pleaded a tender before exhibiting the bill, the plaintiff replied a *latitat* sued out before, the defendant rejoined *non assumpsit* before suing out the *latitat*, and on demurrer had judgment.

Wood and Newton, Tr. 19 G. 2.

Ca. K. B. 444.

In an *indebitatus assumpsit* on a promise to pay on demand, the defendant pleaded *non assumpsit infra sex annos*; the plaintiff demurred, because the plea should have been, that there had been no demand within six years, or *non assumpsit infra sex annos* after demand. But the court held that an *indebitatus assumpsit* shews a debt due at the time of the promise, and therefore the plea good; but if the promise had been of a collateral thing which would create no debt till demand, it might be otherwise. In such case the plea is *quod actio non accrevit infra sex annos.*

Powel and Pierce, Mic. 4 G. 1.

1 Saund. 33. 1 Str. 88. S. P.

Where a mere duty is promised to be paid on request, as in consideration of 10*l.* lent to the defendant, he promised to pay it on request, there no actual request is necessary, but the bringing the action is itself a sufficient demand. But it is otherwise on a promise to pay a collateral sum on request; as where the defendant promised to pay 40*l.* on request if he did not perform an award, there an actual request is necessary, and must be set forth in the declaration, and *sæpius requisitus* will not serve.

Cr. J. 523.

1 Lev. 142.

The defendant may in this action (whether it be a general or special *assumpsit*) upon the plea of *non assumpsit*, which is the

general

general issue, (for if the defendant plead not guilty, the plaintiff may demur, though if issue be joined thereon and a verdict for the plaintiff, it cannot be moved in arrest of judgment) give in evidence any thing which proves nothing due, as the delivery of corn or any other thing in satisfaction, or a release; so he may give in evidence performance. And though in *Fitz.* and *Freestone*, 1 *Mod.* 210. a distinction is taken between a general and special *assumpsit*, and it is said that in the last case payment or any other legal discharge must be pleaded, yet that distinction is not law; but in both cases the defendant is allowed to give in evidence any thing that will discharge the debt, so he may give in evidence an usurious contract, because that makes it a void promise.

1 Sid. 236.
Salk. 140.
Per Holt, H. 2 Ann. Salk. MSS.
Ld. Barnard v. Saul, H. 8 G. 1. Oct. Str. 85.

Note; That a promise before it is broken may be discharged by parol agreement: But after it is broken it cannot be discharged without deed by any new agreement, without satisfaction.

2 Lev. 144. Ca. K. B. 538. 1 Mod. 259.

So he may give in evidence on the general issue, that he was an infant at the time of making the promise. For the gist of the action is the fraud and delusion that the defendant has offered the plaintiff in not performing his promise, and therefore whatever goes to shew there was no contract, or that it was performed or released, or that there was no consideration, goes to the gist of the action, because there could be no delusion or fraud to the plaintiff at the time of the action brought. So he may give in evidence that the plaintiff has a partner, for then it would not be the same contract; or that the promise was made by him and another jointly; though in regard to this there has been some latitude of late in the conduct of most judges, who will not nonsuit a plaintiff on such evidence, unless it appear clearly that the plaintiff knew there were more partners than he has brought his action against, for he gave credit only to such, and therefore the law may well raise an *assumpsit* in them only. And in a late case, where two persons were partners, and the plaintiff dealt with them as such, and intitled his account "*Cole & Shute*," but brought his action against one only, and was nonsuited at the assizes; the court set aside the nonsuit, and granted a new trial.

Gilb. Hist. of C. B. 53.
Leglise and Champante, Str. 820.
Segar and Randal, Mich. 24 Car. 2.
Rice v. Shute, H. 10 G. 3. B. R.

Matters of law that do not go to the gist of the action, but to the discharge of it, are to be pleaded, as the statute of limitations. So if a less sum be paid before that time, because that

is

2 Lev. 81.

is not a performance which deſtroys the being of a promiſe, but a collateral agreement that ſupplies the performance of it: But ſuch evidence may be given in mitigation of damages.

Knight and Cox per Pemberton, Ch. J. in Suſſex 1602.

In *indebitatus aſſumpſit* for goods ſold, the defendant pleaded *non aſſumpſit*, and gave in evidence that he became inſolvent, and that the plaintiff and his other creditors ſigned a letter of licence to authorize him to recover monies due to him, and after that having notice of all that he had recovered divided it, and by agreement took 4*s*. in the pound, and the plaintiff and other creditors ſigned a general releaſe to the defendant; the plaintiff pretended that the defendant gave him a note promiſing to pay the intire debt, if he would ſign the releaſe, and produce the note. But it was holden that the releaſe was good evidence for the defendant on the *non aſſumpſit* in this action, and that the plaintiff ought to declare ſpecially upon the ſpecial promiſe.

Hopkins and Dewar, Hil. 32 G. 2. C. B.

Proof that the plaintiff was a bankrupt at the time of the work and labour done, would be ſufficient to nonſuit him.

Ca. K. B. 409.

If *A*. give a letter of attorney to *B*. to receive money from *C*. and after bring an action againſt *C*. *C*. cannot give in evidence (otherwiſe than in mitigation of damages) that he has paid the money to *B*. ſince the action brought, for the bringing the action is a revocation of the letter of attorney.

Salk. 124.

A. being indebted to *B*. indorſed a bill of exchange to him, and afterward on *aſſumpſit* brought againſt him by *B*. gave it in evidence, and that it had laid ſo long in his hands after it was made payable; but this was diſallowed, becauſe a bill ſhall never go in diſcharge of a precedent debt, except it be ſo agreed; though not applying for payment in a reaſonable time, ſeems fit to be left to the jury as evidence of ſuch agreement.

Griffith and Pope, at G. Hall, 1698. per Treby Ch. J. Oct. S. r. 2. Andr. 190. S. P. Aldworth's caſe Reading, 1749.

B. brought an action for money had and received againſt *A*. and *A*. gave in evidence the payment of 20 guineas to the ſecretary of a foreign miniſter for a written protection for *B*. and likewiſe his journeys and expences in getting it. Mr. Baron *Clarke* directed the jury, that in caſe they believed the application for this protection to be by the order of the plaintiff on his own motion, to allow theſe ſums in the account, but if they thought the advice to get ſuch protection came from the defendant, then to allow him nothing; and accordingly the jury who knew the defendant to be an artful deſigning

designing fellow, and the plaintiff an ignorant young man, who had been drawn into the difficulties he was under by the defendant who acted as an attorney for him, gave a verdict for the plaintiff without allowing the defendant any thing on that account.

One lends an infant money, who employs it in paying for necessaries, the infant is not liable; for it is upon the lending that the contract must arise, and the infant's applying the money afterwards for necessaries, will not by matter *ex post facto* intitle the plaintiff to an action; but perhaps if the plaintiff prove that the money was lent to buy necessaries with, and that it was laid out accordingly, he would be entitled to a verdict. Salk. 279. Ca. K. B. 197.

Assumpsit for goods sold, the defendant pleaded non-age, the plaintiff replied they were *pro necessario victu et apparatu ad manutentionem familiæ suæ*; the defendant rejoined that he kept a mercer's shop at *Shrewsbury*, and bought those wares to sell again, and traversed that he bought them *pro necessario, &c.* and demurrer thereupon; and *per cur'*: This buying for the maintenance of his trade, though he gain thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but for his necessity, *viz.* diet and apparel or necessary learning. But Mr. Baron *Clarke* in such an action before him, where the defendant gave his non-age in evidence, it appearing he had been set up in a farm, and bought the sheep of the plaintiff in the way of farming, directed the jury to give a verdict for the plaintiff, and said he thought the law ought not to put it in the power of infants to impose upon the rest of the world. And the *Scotch* law is agreeable to this determination. *Vide Erskine*'s Principles, *l.* 1. *tit.* 7. *s.* 21. However, in the case of *Wywall* and *Champion* at *Guildhall*, *Lee* Ch. Just. would not suffer the plaintiff to recover for tobacco sent to the defendant, who set up a shop in the country, he appearing to be an infant; for the law will not suffer him to trade, which may be his undoing. Cr. J. 494. Str. 1083.

A copyhold estate devolved on the defendant when he was an infant of six years of age: A fine was assessed, and he was admitted to the estate on his coming of age. *Assumpsit* was brought for this fine, and upon the case reserved the question was, Whether *assumpsit* would lie for the fine, which the jury found Evelyn, Bart. v. Chichester, B. R. Trin. 5 G. 3. Burr. 1717.

found to be a reasonable one? The court held clearly that the action lay: and *per Yates* Just. if *assumpsit* had been brought against the infant during his minority, it would have lain. Debt in this case may not lie against an infant, because he
2 Bulstr. 69. cannot wage his law; but if an infant take a lease for years and hold, he may be charged in debt for that rent. If an infant be bound for necessaries, *a fortiori* he is for an old fine, which is necessary to entitle him to receive the rents and profits of his estate, thereout to provide necessaries. But in this case it is clear beyond all doubt, as he has confirmed the contract by his enjoyment since he came of age.

Lord *Bacon* in his maxims to illustrate his eighteenth rule, "*persona conjuncta æquiparatur interesse proprio*," says that if one under age contract for the nursing of his lawful child, the contract is good, and shall not be avoided by infancy.

Str. 168. So necessaries for an infant's wife are necessaries for him, but if provided only in order for the marriage, he is not chargeable, though she use them after.

But though a promise by an infant will not bind him unless for necessaries, yet he shall take advantage of any promise made to him, although the consideration for such promise
Str. 937. were the infant's promise; as in the case of *Holt* and *Ward*, where the plaintiff an infant recovered in an action on mutual promises of marriage.

Str. 690. And note; If goods not necessaries be delivered to an infant, if after full age he ratify the contract by a promise to pay, he is bound.

Capper and Davenant, Tr. 29 Car. 2. B. R. Post. 178. An infant bought a chariot and horses, and within age gave a single bond for the money and afterward at full age promised to pay. In an action of *assumpsit* this matter was found specially, and the court were of opinion that the contract was so extinguished by giving the bond, that it did not remain so as to be a consideration for this promise at full age, and gave judgment for the defendant.

As it is very common in *assumpsit* for the defendant to plead *non assumpsit* as to part, and a tender as to the rest, it is proper to be known that upon such an issue it is sufficient for the defendant to prove a tender of the money in bags, or untold, for it is the receiver's business to tell it; but if the
5 Co. 115. Noy. 74. defendant say, "Here I am ready to pay you," and yet hold the

the bags all the time under his arm, it would not be a good tender.

And note; that a tender cannot be pleaded after an imparlance, unless within the first four days in term, except under particular circumstances the court give leave so to do; as where the writ was returnable in *Easter* term, and declaration not delivered till the day before the essoign day of *Trinity*, and the defendant lived in *Shropshire*, so that the agent could not get instructions in time.

Bailey and Holdstone, Tr. 16 & 17 G. 2. C. B.

Where there is no certain time in the promise for the payment of the money, the defendant is to be always ready to pay, and when he pleads *semper paratus* the plaintiff must in his replication shew a special request and refusal, if there be any, for the request laid in the declaration is not material nor traversable.

Ferrand and Pearson, E. 2. G. 1. C. B. and Johnson and Mappletoff, Lutw. 224. denied to be law.

Note; the jury may in this action, if they see reason, give less damages than are proved: as suppose a promise to pay for an horse a farthing a nail, doubling it each time; or a promise to pay 1000*l.* if the plaintiff cured the defendant's eye, or such like.

Boldero and Andrews, H. 26 & 27 Car. 2. per Hales Ch. J. 1 Vent. 65. 267.

CHAPTER III.

Of the Action of Covenant.

THERE is no set form of words necessary to be made use of in creating a covenant, and therefore any will do which shew the parties' concurrence to the performance of a future act; as when a lessee covenants to repair, "Provided always and it is agreed that the lessor should find timber," this makes a covenant on the part of the lessor.

1 R. A. 518. 2 Co. 72. b.

Though covenant lies on a deed poll as well as on a deed indented, yet the parties must be named therein; and therefore

Salk. 197.

fore if upon oyer the deed appear to be only that the defendant promifed and engaged himfelf to bring in the body of *A.* without faying to the plaintiff, no action will lie.

5 Co. 17. Carth. 98. 2 R. R. 399. Stiles 400. There are fome words which of themfelves import no exprefs covenant, yet in certain contracts amount to fuch, and are therefore covenants in law; as where a man leafes lands for years by the words *conceffi* or *demifi*, if the leffee be evicted he may have covenant. So if an affignment be made by the word grant. So the words *yielding and paying* make a covenant for paying of rent.

4 Co. 80. b. Owen 104. But if a man leafe goods by indenture which are evicted within the term, yet the leffee fhall not have covenant, for the law does not create any covenant upon fuch perfonal things; and therefore in the cafe of a leafe of a houfe with the goods, it is ufual to make a fchedule of them, and have a covenant from the leffee to re-deliver them at the end of the term; for otherwife the leffor can only have trover or detinue.

1 Saund. 321. Covenant will lie for a misfeafance, but not for a nonfeafance; as if a man grant a way, and after ftop it, but it is otherwife if he let it go out of repair.

1 R. A. 517. If *A.* for a valuable confideration promife by deed not to do a certain thing, cafe will not lie, but covenant; as where *A.* recovered a debt againft *B.* *B.* paid the condemnation; upon which *A.* releafed all actions, executions, &c. by deed, and by the fame deed promifed to difcharge all writs of execution againft *B.* upon the faid judgment.

Dy. 337. 5 Co. 19. 1 Saund. 155. If the covenant be joint, yet if the intereft be feveral, the covenant fhall be taken to be feveral, and though the covenant be joint and feveral, yet if the intereft be joint the action muft be fo too; As if *A.* covenant to do an act for the benefit of *B.* and *D.* and enter into bond to them *et cuilibet eorum* for performance, the intereft being joint each cannot bring a feparate action; but two may bind themfelves jointly and feparately to pay money, and the obligee may fue which he pleafes.

Ca. K. B. 552. If feveral covenant jointly and feverally, a defeafance to one is a defeafance to all; but in fuch cafe if *A.* covenant that he will not fue *B.* yet he may ftill fue the reft, for though a covenant that is a perpetual bar, to avoid circuity of action, is conftrued a releafe, yet it is not fo in its nature, and therefore where he has a remedy left againft the reft, it fhall be conftrued

conſtrued a covenant and no more. So two deeds made at the ſame time between the ſame parties, that have not a reference the one to the other, ſhall not be conſtrued to be a defeaſance the one of the other. Ca. K. B. 222.

And note, that in caſe of leaſes for years, the defeaſance may be after the firſt deed, but it would be otherwiſe in caſe of freeholds of corporeal inheritances. Hambly v. Bp. of Wilton & al. Tr. 16 & 17 Geo. 2. C. B.

Indenture between *Rolle* and another of the one part, and *Yate* of the other part, among other covenants one was thus: "It is "agreed between the parties, that *Yate* ſhall enter into a bond "to pay *Rolle* 160 *l.* by ſuch a day," *Rolle* died, the money not being paid, his executors brought covenant againſt *Yate*; and the court held that he who ſurvived ought to have the action. Yelv. 177.

If in covenant againſt two there be judgment by default againſt one, and the other plead performance, which is found for him, the plaintiff ſhall not have judgment againſt the other. 1 Lev. 63.

If two men leaſe for years, and covenant that the leſſee ſhall enjoy free from incumbrances made by them, this ſhall be taken to be ſeveral as well as joint. Noy 86.

Note; If the covenant be joint, and the action brought only againſt one, advantage muſt be taken by pleading it in abatement. But where it is brought by one covenantee where there are ſeveral, advantage may be taken of it without pleading it in abatement by craving oyer, and demurring generally; Note, tenants in common ought to join in the action of covenant for rent. Vernon and Jefferies, M. 14 Geo. 2. 1 Sid. 420. 1 Vent. 34. Co. L. 198.

A. covenants that *B.* ſhall ſerve *D.* as an apprentice for ſeven years and dies; if *B.* depart within the term, covenant will lie againſt the executor of *A.* though not named. Br. Covenant, 12.

Covenants real, or ſuch as are annexed to eſtates, ſhall deſcend to the heir of the covenantee, and he alone ſhall take advantage of them. As where the leſſee covenants with the leſſor, his executors and adminiſtrators, to repair, the heir of the leſſor may have covenant, though not named. So if *A.* covenant to make a new leaſe to *J. S.* at the end of the term *J. S.* dies before, his executor may bring covenant, though not named. Pl. Com. 290.

Where the plaintiff declared, that the defendant ſold to the plaintiff's teſtator certain land, and covenanted with him, his heirs and aſſigns, that he ſhould enjoy againſt him and Sir *P. Vanlore*, and all claiming under them; and aſſigned for breach, that one claiming under Sir *P. Vanlore* ejected his teſtator, it 2 Lev. 26.

was objected, that the action ought to have been brought by the heir or assignee. But it was holden that the eviction being in the life-time of the testator, he could not have an heir or assignee of this land, and so the damages belong to the executor, though not named.

5 Co. 16. Ibid. 24.

The assignee of a term is bound to perform all the covenants which are annexed to the estate, such as to pay rent, repair houses, &c. but if the lessee covenant to build a wall upon the premisses, it shall not bind the assignee unless he be expresly named in the covenant, and though he be named, yet if the covenant were broken before the assignment, he shall not be bound.

Salk. 199. Burr. 1271.

Carth. 319.

A. leases to *B.* who covenants to repair, and assigns to *J. S.* who dies intestate, the lessor may bring covenant against the administrator of *J. S.* and declare against him as an assignee.

Cr. J. 309.

If the lessee covenant or repair to pay rent, and grant over his term, yet covenant will lie against him or his executors, though the lessor have accepted rent from the assignee.

Jordan and Cowel, 9 G. 2. 1 Lev. 215. 1 Sid. 402. Salk. 81.

So an assignee who assigns over is liable to covenant for the rent incurred during his enjoyment, and if covenant be brought, he may plead that before any rent was due he granted and assigned all his term to *J. S.* who by virtue thereof entered and was possessed; and this will be a good discharge without alledging notice of the assignment, and the assigment will be good though made the day before the rent due to a prisoner in the *Fleet*, nor can the plaintiff take any advantage of it by replying *per fraudem*, unless he can prove a trust: It was the lessor's own fault and folly to take the first assignee for his tenant, nor is he without remedy, for he may bring covenant against the lessee, or distrain upon the land.

Lekux and Nash, per Lee, Guildhall, Hil. 1744. Str. 1221. Salk. 81, Carth. 177.

5 Co. 17. b.

As the assignee shall be bound by a covenant, which runs along with the land, so shall he take advantage of it. If a man lease land to another by indenture, this covenant in law will go to the assignee of the term.

By 32 *H.* 8. *c.* 34. reciting, Whereas divers had lands, manors, &c. for life or years by writing, containing certain considerations and agreements, as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors: And whereas by the common law no stranger to any condition or covenant could

could take advantage thereof: It is enacted, that all persons, their heirs, successors and assigns, which have or shall have any grant of the king of any lands, manors, *&c.* or any reversion thereof, and also all other persons being grantees or assignees to or by the king, or to or by any other person or persons, and the heirs, executors, successors and assigns of every of them, shall and may have like advantage by entry for non-payment of rent, or for doing waste or other forfeiture, and the same remedy by action only for not performing other conditions, covenants and agreements contained in the said leases, against the lessee and grantee, their executors, administrators and assigns, as the lessors and grantors, their heirs or successors ought, should, or might have had at any time or times; and by the same act all farmers, lessees and grantees for years, life or lives, their executors, administrators and assigns, shall and may have like action and remedy against all persons, their heirs, successors and assigns, which, by the grant of the king or other persons, shall have the reversion or any part thereof, for any condition, covenant or agreement contained in their leases, as the lessees or any of them might or should have had against the lessors and grantors, their heirs and successors; recovery in value by reason of any warranty in deed or in law only excepted.

It is plain, this act does not extend to gifts in tail, nor to a grantee by fine till attornment, for it must be intended of such assignees only, as have had all ceremonies by law requisite. Co. L. 215.

The first clause extends to grantees of part of the estate of the reversion, but not to grantees of the reversion in part of the land. Ibid.

Whoever comes in by the act and limitation of the party, though in the *post*, is a sufficient grantee within this statute, but it does not extend to such as come in merely by act of law, nor to him who is in of another estate. Ibid.

The grantee shall not take advantage of a condition before he has given notice to the lessee, though he may of a covenant. Moor 876. Co. L. 215. Cr. J. 476.

The words "other forfeiture," shall be taken for other forfeitures like to the examples there put, *viz.* payment of rent, or doing waste, which are for the benefit of the reversion, and therefore conditions for payment of any sum in gross, delivery of corn, *&c.* are not within the meaning of this act. The privity of action is transferred, and it may be brought in the Co. L. 215. b. 1 Saund. 237.

 country

country where the covenant was made, as well as where the land lies.

2 Show. 134. Covenant by the aſſignee of the leſſor againſt the leſſee after his aſſignment, and after acceptance of rent from the aſſignee, it is good within the ſtatute.

Cr. J. 305. Gilb. Ten. 181. Carth. 205. Salk. 285. 3 Lev. 326. 1 Show. 284. 4 Mod. 80. Skin. 296. 305.

It was formerly holden, that the ſurrenderee of a copyhold was not an aſſignee within this act; but the latter caſes have holden otherwiſe.

Cr. E. 7. All covenants are to be taken according to the intent of the parties; as where the condition of a bond was to deliver to the plaintiff an obligation (in which he was bound to the defendant) before ſuch a day; if the defendant ſue the plaintiff on the obligation and recover, and afterward before the day deliver the obligation, it will not be a performance. But if *A.* be bound to *B.* that his ſon (then being *infra annos nubiles*) ſhould before ſuch a day marry *B.*'s daughter, and he does marry her accordingly, and after at the age of conſent diſagrees to the marriage, yet the covenant is performed. But

1 Lev. 102. if there be any doubt on the ſenſe of the words, ſuch conſtruction ſhall be made as is moſt ſtrong againſt the covenantor. Therefore if *A.* covenant with *B.* that if *B.* marry his daughter, he will pay him 20 *l.* *per annum* without ſaying for how long, yet it ſhall be for the life of *B.* and not for one year only.

Hob. 34. A covenant for quiet enjoyment ſhall not be conſtrued to extend to a wrongful ejectment by a ſtranger, unleſs ſo expreſſed.

2 Mod. 138. If *A.* grant a rent charge to *B.* for the uſe of *J. S.* *habendum* to *B.* his heirs and aſſigns to the uſe of *J. S.* and covenant with *B.* to pay to the uſe of *J. S.* if the rent be behind, *B.* may have covenant.

Salk. 198. Where a man covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the ſtatute repeals the covenant.

So if a man covenant to do a thing which is lawful, and an act comes to hinder him from doing it, the covenant is repealed. But if a man covenant not to do a thing which was then unlawful, and an act come and make it lawful, ſuch act does not repeal the covenant.

If

If the principal thing to be performed as the conveyancing an estate, &c. be void, further covenants which are relative and dependant thereon, are so likewise; but where the covenants are distinct and separate, it is not material whether an estate passed or not; as a covenant for the payment of a sum of money. 1 Salk. 309. 1 Salk. 199.

For the better understanding what shall be said to be a breach of covenant, and how far it is necessary to set it forth in an action of covenant, it will be proper likewise to take notice what would be a breach of a promise or condition, and how far it is necessary to set it forth in an action of debt or upon the case.

Debt upon bond conditioned to pay on or before the 5th of *September*, the defendant pleaded payment on the 5th; the plaintiff replied that he did not, and thereupon issue joined: After verdict for the plaintiff, judgment arrested because the replication should have been, that he did not pay at the day, nor at any time before; for otherwise he does not shew a breach to intitle himself to his action, which is necessary in all cases where the plea is founded upon something within the condition. But it is otherwise where the plea is of a collateral matter, (as a release, &c.) for such plea admits a breach, and this rule holds in all cases, except in bonds for the performance of an award; for there, though a collateral matter be pleaded (such as *nul agard fait*,) yet the replication must shew a breach, that it may appear to the court to be in such part of the award as is good; for an award may be good in part and bad in part. Tryon and Carter, Tr. 1734. 2 Str. 994. S. C. Burr. 944. Salk. 138. S. P.

In case for that the defendant promised to deliver, on or before the 5th *January*, 20 quarters of corn out of a ship into a barge, to be brought by the plaintiff, and breach assigned that the defendant did not deliver on the 5th; on *non assumpsit* verdict for the plaintiff, and on motion in arrest of judgment it was holden by *Holt* Ch. Just. that as the defendant could not make a tender before the last day, it shall not be presumed that the plaintiff was there to receive it sooner, therefore the declaration would have been good on demurrer, but clearly so after verdict, because an actual delivery at any time might have been given in evidence on the *non assumpsit*. Salk. 140.

In debt upon bond the defendant prayed oyer of the condition, which was to perform covenants in an indenture, and thereupon he brought the indenture into court, and pleaded that there were no covenants on his part to be performed. The 1 Saund. 316.

plaintiff prayed *oyer*, and in fact there being ſeveral covenants on the defendant's part to be performed, he demurred. *Saunders* for the defendant objected, that the plaintiff had demurred *trop haſtivement*, for that he ought to have ſhewed a breach to maintain his action; but the plaintiff had judgment, for it appeared judicially to the court, of the defendant's own ſhewing, that he had pleaded a falſe plea, and therefore there was no occaſion for the plaintiff to ſhew any matter of fact to maintain his action.

Buſher and Philips, H. 8 G. 2.

In debt upon a bail-bond, the declaration ſet forth that *A.* and *B.* and the defendant became bound jointly and ſeverally for the appearance of *A.* that *A.* did not appear, and that the defendant had not paid; ſpecial demurrer, becauſe not averred that the money was not paid by either of the other two, and compared to a covenant by three. However, upon ſearch of precedents, the plaintiff had judgment.

Rodham v. Strother, M. 29 Car. 2. K. B.

Debt on bond conditioned to perform an award, the defendant pleads *nul agard*. The plaintiff replies, and ſhews an award to pay a ſum of money, but no time expreſſed when, and aſſigned a breach in non-payment *licet ſæpius requiſitus*. On demurrer the court held it not neceſſary to alledge a ſpecial requeſt but where the other party may traverſe it, which he could not do here without a departure.

3 Raym. 107.

There is a great difference between aſſigning a breach in an action of covenant, and in debt upon bond conditioned for the performance of covenants, becauſe in covenant all is recoverable in damages, and thoſe will be what the party can prove he has actually ſuſtained, but in the other caſe a breach is a forfeiture of the whole bond; therefore in covenant it is ſufficient to aſſign the breach in the words of the covenant, but that would not do in debt upon bond for the performance of covenants.

And this leads me to take notice of another difference between covenant and debt, *viz.* That at common law in debt upon bond, with condition to perform covenants, the plaintiff could aſſign only a ſingle breach, but in covenant he might aſſign as many breaches as he pleaſed; but now by the 8 & 9 *W.* 3. *c.* 11. the plaintiff may in debt on bond, or on a penal ſum for performance of covenants, aſſign as many breaches as he ſhall think fit, and the jury ſhall aſſeſs not only ſuch damages and coſts as have been heretofore uſually done in ſuch

cases, but also damages for such of the said breaches as the plaintiff shall prove to have been broken, and like judgment shall be entered on such verdict as has been heretofore usually done on such like occasions; and if judgment be given for the plaintiff on demurrer, or by confession or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches as he shall think fit, upon which shall be a writ of enquiry, *&c.* and in case the defendant after judgment, and before execution, shall pay into court such damages and costs, a stay of execution shall be entered on record; or if by execution the plaintiff shall be paid and satisfied all such demands, costs and charges, the body, land or goods of the defendant, shall be thereupon discharged, which shall likewise be entered upon record; but in each case such judgment shall remain as a further security to answer the plaintiff such damages as may be sustained for further breach of any covenant in the same deed, whereupon the plaintiff may have a *sci. fa.* and so *toties quoties*.

But notwithstanding this act, the plaintiff may take damages only *occasione detentionis debiti*, and take out execution for the penalty. Dry and Bond, Tr. 16 & 17 G. 2. C. B.

In covenant not to buy or sell without the plaintiff's leave for two years, breach assigned that *diversis diebus ac vicibus* between such a day and such a day he had sold to *H.* and several other persons unknown, goods to the value of 100 *l.* and *per Holt*, Ch. Just. in debt on bond to perform covenants, the replication must shew a certain breach, but in covenant it is enough to assign a general breach, and this is certain enough for it is so described that if another action be brought, the defendant may plead a former recovery for the same cause, and aver this to be the same selling. Salk. 139.

In covenant for rent the breach assigned was, that the defendant had not paid, without saying "or his assigns;" and the court held the breach well assigned, for the court will not presume an assignment. Mayor of London v. Sir Fisher Tench, Hil. 1733. K. B.

And now to consider what shall be a sufficient performance, and how to plead it.

Where a person undertakes by bond for doing of an act, it is not sufficient for him to shew that he has done all in his power, for the condition is for his benefit, and if not performed he is subject to the penalty; however this rule is subject to this exception, *viz.* Where the condition is prevented from Hesketh and Grey, Tr. 27 G. 2.

being performed by the act of God, as by the death of the party before the day, or by the act of law; as if I gave a bond conditioned to do an act, and a ſtatute afterward made it unlawful; or by the act of the obligee himſelf, for it would be unjuſt that he ſhould take advantage of his own wrong.

Snelling v. Stagg and Andrews, M. 26 Car. 2. C. B.

Covenant on a demiſe of a meſſuage with the appurtenances, in which the defendants covenanted to repair, and breach aſſigned in not repairing: the defendants pleaded the entry of the plaintiff *in atrium poſterius* of the meſſuage. The court held it no plea, for the entry into the back yard does not ſuſpend the covenant to repair, as he is ſtill in poſſeſſion of the meſſuage; but the rent is ſuſpended by an entry into any part.

Fletcher v. Richardſon, 10 G. 2. Co. L. 303. b. 1 Sid. 87. Palm. 70.

Where there is an expreſs negative and likewiſe an affirmative in the covenant, the defendant muſt not plead generally, covenants performed, but muſt ſet forth that he has not done what he covenanted not to do, and that he performed what he covenanted to perform; and if any of the covenants be in the disjunctive, he muſt ſhew what part he has performed; ſo if any of them be to be done of record, the performance muſt be ſhewn ſpecially, becauſe the record ſhall be tried by itſelf.

But note; That if the negative, covenant be only in affirmance of the affirmative, performance generally is a good plea.

1 Saund. 319.

If by a deed two things are to be performed, one on the part of the plaintiff, the other on the part of the defendant, if there be not mutual remedy, the plaintiff ought to aver performance on his part: But where the agreement was in theſe words, "It "is agreed upon by *G. S.* and *B. C.* that the ſaid *B. C.* ſhall "give *J. S.* 100 *l.* for all his lands in *Dale*; in witneſs where- "of we do mutually put our hands and ſeals:" It was holden that the action was well brought without averring the conveyance of the land, for if it were not conveyed the defendant might have an action of covenant againſt the plaintiff; but it had been otherwiſe, if the ſpecialty had been the words of the defendant only, and not the words of both parties by way of agreement, as in the caſe ſtated.

Str. 569. Q. & vi. Kingſton v. Preſton.

1 Saund. 155.

If the covenant of the one part be negative, and the affirmative covenant of the other part be in conſideration of the performance thereof; though the negative be broken, yet the affirmative ought to be performed, for it is not a condition precedent, as a negative covenant cannot be ſaid to be performed while it is poſſible to be broken.

Where

Where the covenant is for the act of a stranger, there performance generally is not a good plea, but he must shew how performed. 1 Show. 1.

A. covenants that he has full power to lease, *&c.* in covenant it is sufficient for the plaintiff to say that he had not full power, but in such case the defendant must shew what estate he had at the time of making the lease, that it may appear he had full power, and then the plaintiff must shew a special title in somebody else, but the covenant being general, the general assignment is *prima facie* good; yet if *A.* covenant to permit *B.* to take the rents and profits of certain land, *non permisit* alone is too general; for in such case the defendant could not plead *quod permisit*. 9 Co. 60. 8 Co. 89.

In this action of covenant the damages, and not the debt, being the thing in demand, there is no necessity of pleading tender and refusal with an *uncore prist*. 1 Show. 130.

In covenant for non-payment of rent, the defendant cannot plead levied by distress, for that is a confession that it was not paid at the day, but *riens* in arrear, or payment at the day, will be a good plea. *Aliter* of riens in arrear generally. 2 Brownl. 273. Slater v. Carter, C. B. East. 4 G. 1. King's Rep. 130. Brownl. 19.

A release of all demands is not a release of a covenant before it is broken, and therefore cannot be pleaded in bar; but accord and satisfaction is a good plea though the action be founded on a deed, for it is not pleaded in discharge of the covenant, but only of the damages, and the covenant remains. 2 Show. 90. Cr. J. 99.

In covenant for a year's rent due *Michaelmas* 1726, the defendant craved *oyer* of the lease, in which there was a covenant on the part of the lessee to repair (except the premisses shall be demolished by fire) and then pleaded that before *Michaelmas* 1725 the premisses were burnt, and that they were not rebuilt by the plaintiff during the whole year for which the rent was demanded, nor had he any enjoyment of the premisses, therefore prayed judgment if he should be charged with the rent. The plaintiff demurred and had judgment, for whatever was the default of the plaintiff in not repairing, yet the defendant must at all events perform his covenant. Str. 763. Ld. Raym. 147.

CHAPTER IV.

Of Debt.

THE action of debt is founded upon a contract either express or implied, in which the certainty of the sum or duty appears; and the plaintiff is to recover the sum *in numero*, and not to be repaired in damages, as he is in those actions which found only in damages, such as *assumpsit*, &c. But when the damages can be reduced by the averment to a certainty, debt will lie, as on a covenant to pay so much *per* load for wood, &c. So if in an action, in which the plaintiff can only recover damages, there be judgment for him, he can afterward bring debt for those damages.

3 Lev. 429.

4 Co. 90.

Wicker and Norris, 8 G. 2.

Debt will lie for an amercement in a court leet, but then the declaration ought to set forth, that the defendant was an inhabitant as well at the time of the amercement as of the offence, but this will be cured by the verdict, for it must be proved at the trial.

Carth. 74.

Note; In this case the defendant may traverse the fact of the presentment.

Hill and Hollister, E. 19 G. 2. K. B.

But where there is an averment in the declaration which is not necessary to maintain the action, the plaintiff is not bound to prove it; as where in debt on a policy of insurance the declaration set forth an agreement in the policy that if any dispute arose, it should be referred to arbitrators to be chosen one by each party, and averred that it had not been referred, and that without default in the plaintiff; at the trial the plaintiff did not prove he ever named a referee, and therefore it was objected that he had not proved his declaration. But on a case reserved the court held it to be no part of the contract, but a collateral agreement, therefore not necessary to be set out in order to intitle the plaintiff to his action, and therefore not necessary to be proved.

Hob. 206.

If a sheriff levy money at the suit of *J. S.* and return the writ served, *J. S.* may have debt against the sheriff for the money without any actual contract. But if he return that he has taken goods into his hands to such a value, which remain *pro defectu emptorum*, he shall not be charged.

Note;

Note; Debt against the sheriff for money levied upon a *fi. fa.* is not within the statute of limitations (21 *Jac.* 1. which enacts that actions of debt grounded upon any lending or contract without specialty, debt for arrearages of rent, *&c.* shall be brought within six years,) for though it be not a matter of record till the writ be returned, yet it is founded upon a record, and hath a strong relation to it. 2 Show. 79.

If a statute prohibit the doing a thing under a certain penalty, and prescribe no method of recovery, the party intitled may bring debt. 1 R. A. 598.

If a pawner (after tender and refusal) recover goods in an action of trover, yet the pawnee may have debt for his money, for the duty remains. Co. L. 209.

So if the pawn be stolen or perish without the default of the pawnee. Str. 919.

A. paid money to *B.* as a fine upon *B.*'s promise to make a lease of land; before the lease made *B.* was evicted; the court held debt would not lie for the money, for it was not paid to be received back again.—It appears by what is said *ante fo.* that in such case the party might bring an action of *assumpsit* for money had and received to his use; and therefore it is probable that on the same ground the courts would now hold that the action of debt would lie. Palm. 364.

If a man enter into a bond for the payment of several sums of money at several days, debt will not lie till the last day be past: And it is the same upon a contract, for where there is but one contract there can be but one debt, and consequently but one action of debt. But on a covenant or promise, after the first default covenant or case will lie, for as often as the money is not paid, so often there is a breach of covenant. Co. L. 47. b.

What is said above is meant of single bonds; for where there is a bond in a penal sum, conditioned to pay money at different days, the condition is broken, and the bond become absolute upon failure of payment at either of the days, and debt will lie before the last day is past. Cotes and Howel, M. 18 G. 2.

If this action be brought for money, it must be in the *debet* and *detinet*; if for goods in the *detinet* only. So if brought for foreign money not made current: Or it may be brought in the *debet* and *detinet* for such a sum as is the value of the foreign. 1 R. A. 604. Palm. 407. Yelv. 135.

An

1 Lev. 250.

An executor muſt bring debt in the *detinet* only, though this would be aided after verdict by the 16 *Car.* 2. and the 4 *Ann. c.* 16. extends all the ſtatutes of jeofails to judgments to be entered on confeſſion, *&c.* So if an executor bring debt againſt a ſheriff upon an eſcape, it ſhall be in the *detinet* only. So if he bring debt upon a judgment obtained by himſelf: But if he take a bond for a debt due to his teſtator, debt upon it muſt be in the *debet* and *detinet*; ſo if he ſell the goods of his teſtator, and bring debt for the money. But if an executor were to take a freſh bond with an additional obligee, payable at the ſame time as the former, it ſeems in ſuch caſe as if he ſhould bring debt upon it in the *detinet* only, for by ſuch change of the ſecurity he does not make himſelf liable, as he does in the other two caſes. So debt againſt an executor ſhall be in the *detinet* only, for he is chargeable no further than he has aſſets; but after judgment againſt an executor, one may have debt in the *debet* and *detinet*, ſuggeſting a *devaſtavit*, and thereby charge him *de bonis propriis*. So in debt for rent incurred in his own time, and ſo in debt againſt an heir on the bond of his father.

1 R. A. 602.

1 R. A. 603.
5 Co. 31.
Ibid. 36.

Taylor v. Holman & Robins, G. Hall Sittings after Tr. 1764.

In debt on a judgment againſt the defendants as executors ſuggeſting a *devaſtavit*; In the original action the defendants had pleaded *plene adminiſtravit*, and the plaintiff had taken judgment of future aſſets *quando acciderent*. Lord *Mansfield* would not allow the plaintiff to give any evidence of effects come to the hands of the defendant before the judgment; for the plaintiff has admitted that the defendants fully adminiſtred to that time: And there being no evidence of any aſſets come to his hands ſince, the plaintiff was nonſuited.

2 Raym. 1502.
Per Pemberton C. J. at Hertford, Lent 1683.

In debt upon bond, the defendant cannot plead *nil debet*, but muſt plead *non eſt factum*; and it has been ſaid, that if on ſuch iſſue there be a variance in the date between the count and the deed, the plaintiff ought not to be nonſuited, becauſe the deed is brought into court, and remains there; and therefore the material part of the iſſue is, whether the deed brought into court be his deed, and the deed in court is the deed upon which, notwithſtanding the miſtake. However this opinion may well be doubted of, for it is the conſtant practice to compare the declaration with the bond produced at the trial; yet where the plaintiff declared of a deed of covenant, dated 30th *March anno Domini* 1701. *annoq. regni* 13 *W.* 3. and made a profert upon

Salk. 658.

upon *oyer*, the deed was only dated 30th *March* 1701, wanting *anno Domini et anno regni*, &c. and though it was demurred to for the variance, the court held it none, for it was implicitly in the deed.

Debt on bond, *quod cum defendens apud* London, &c. *per scriptum*, &c. *concessit se teneri* to the plaintiff in 40 *l. solvend.* to the plaintiff, &c. the defendant craved *oyer*, and the bond was to pay to his attorney or his assignees, and was dated at *Port Saint David's*, the defendant pleaded these variances in abatement; and *per cur.* the first is no variance, for payment to the plaintiff or his attorney is the same thing, the *teneri* made it a debt to the plaintiff, and a *solvend.* to any body else would be repugnant: But the second variance is fatal, for the dating made the bond *local*, but he might have declared *quod cum* the defendant, *apud* Port St. David's, *viz. apud* London *in paroch'*. Salk. 659.

In debt for rent, if it be reserved by deed, the proper plea is *non est factum*, if without deed *non dimisit*; or if by deed he may plead *nil debet*, for an indenture does not acknowledge a debt like an obligation, for the debt accrues by the subsequent enjoyment. Hard. 332.

The difference is where the specialty is but inducement to the action, and matter of fact the foundation, there *nil debet* will be a good plea; but where the deed is the foundation, and the matter of fact but inducement, there *nil debet* is no plea. 2 Raym. 1503.

In debt for rent upon an indenture, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements, because, if he had pleaded it specially, the plaintiff might have replied the indenture and estopped him, or the plaintiff might demur, for the declaration being on the indenture, the estoppel appears on record. But if the defendant plead *nihil habuit*, &c. and the plaintiff will not rely on the estoppel, but reply *habuit*; the jury shall find the truth. Salk. 277.

In debt against a sheriff, the plaintiff declared on a judgment against *J. S.* and a *fi. fa.* taken out and delivered to the defendant, who *virtute* thereof hath levied the money; the defendant pleaded *nil debet*, and it was holden a good plea, and this difference taken, that where the writ has not been returned, the plea is good, because it is matter of fact, whether he has levied the money or not; otherwise where the *fi. fa.* is returned. Ca. K. B. 604.

By

By 4 & 5 *Ann. c.* 16. *s.* 12. Where debt is brought on any single bill, or upon any judgment, if the money due thereupon have been paid, such payment may be pleaded in bar: And so of a bond conditioned to pay money, though the money were not paid at the day and place, yet if it were paid at a subsequent day, the defendant may plead it in bar; but the defendant cannot plead a tender and refusal of principal and interest at a subsequent day in bar, for that is not within the equity of the statute; for such construction would be prejudicial, as it would empower the obligor to compel the obligee at any time without notice to take in his money.

Underhill v. Matthews, E. 1 G. 1. C. B.

Dy. 219.

In debt upon a contract, the plaintiff must prove the same contract as is alledged in his declaration; as if debt be brought on a contract for 20 *l.* proof of a contract for 20 marks is not sufficient, though the defendant pleaded *non debet prædict.* 20 *l. nec aliquem denariorum*, for there is a difference between the contract proved, and the contract declared upon.

Incledon and Crips, 2 Salk. 658. 2 Raym. 814. S. C.

The plaintiff declared upon a deed whereby the defendant covenanted to pay the plaintiff 35 *l.* for every hundred of wood in such a place, and that he delivered so many,—— hundred and one half, which came to 182 *l.* 10 *s.* the defendant demurred; and the court held, First, there can be no apportionment, and the demand of the half hundred is more than can be due by contract. Secondly, a *remittitur* may be entered for that, and judgment for the rest. But where the sum demanded depends on the deed itself, and on nothing extrinsical, (as in debt or covenant to pay 20 *l.*) there can be no *remittitur*. But here it might be more or less by matter extrinsic; and therefore the variance not inconsistent with the deed.

Memot and Bates, Hil. 4 G. 2.

If the defendant plead *non est factum*, the plaintiff must prove the execution of the deed, and proof that one who called himself *B.* executed is not sufficient, if the witness did not know it to be the defendant.

5 Co. 119.

The defendant may on the general issue give in evidence any thing which proves the deed to be avoided, though it were delivered as his deed, for the plea is in the present tense, and if it be avoided, it is not now his deed; as if it have a rasure before the action brought: But if the alteration be by a stranger without the privity of the obligee in a point not material, it will not avoid it. And note; Though if some of the covenants of an

11 Co. 27.

indenture

indenture or conditions of a bond be againſt law, they are void *ab initio*, and the others ſtand good, (for if part of the condition be bad by the common law, and part good, the deed will be good for that part of the condition which is good, *aliter* where part is made bad by ſtatute.) Yet if a deed contain divers diſtinct and abſolute covenants, or a bond divers diſtinct and abſolute conditions, if any of them be altered by additions, interlineations or raſure, this misfeaſance *ex poſt facto* avoids the whole deed. So if the ſeal be broken off, but the jury may find it was broken by chance. Francis v. Wingate, E. 11 G. 2.

Three were bound jointly and ſeverally in an obligation, and on an action brought againſt one of them, he pleaded that the ſeal of one of the others was torn off, and the obligation cancelled, and therefore void againſt all. Upon demurrer, it was adjudged that the obligation by the tearing off the ſeal of one of the obligors became void againſt all; notwithſtanding the obligors were bound ſeverally as well as jointly. But if the obligation had been only ſeveral, and the ſeal of one were broken off, it ſeems the obligation would continue good againſt the others. 2 Lev. 220. 2 Show. 28. 11 Co. 28. b. Law of Evid. 111.

The defendant may give in evidence, that they made him ſign it when he was ſo drunk, that he did not know what he did, (or that he was a lunatic at the time. *Yates* and *Boon*, *Middleſex*, *M.* 12 *G.* 2. *Str.* 1104.) or that it was delivered as an eſcrow on a condition not performed. But if the deed be only voidable, the defendant ſhall not avoid it, or take any advantage of it on the plea of *non eſt factum*; as that the obligor was an infant, or that it was obtained by dureſs. So the defendant cannot give payment in evidence on this plea; but may give in evidence that ſhe was a feme covert at the time of entering into ſuch bond, for that proves it not to be her deed. Cole and Robins, H. 2 An. per Holt. Salk. MSS. 2 R. A. 683. 5 Co. 119. Ca. K. B. 609.

If the defendant plead dureſs, the deed is admitted, and the iſſue lies upon the defendant; and if the defendant prove the deed was given under an arreſt without any cauſe of action, it is ſufficient: or if the arreſt were without good authority, tho' for a juſt debt; or if the arreſt were by warrant from a juſtice of peace on a charge of felony, when no felony was committed, or though a felony were committed, yet if the arreſt be unlawfully made uſe of, it may be conſtrued a dureſs. 5 Co. 119. Aleyn 92. Wooden and Collins, Mic. 9 G. 2.

In 1 *Ro. Abr.* 687. It is ſaid that a man ſhall avoid his deed by dureſs of his goods, as well as of his perſon, but in *Sumner* and *Feryman*, *Hil.* 1708, it was holden that a bond could not be avoided by dureſs of goods.

Str. 917.

If *A.* menace me, except I make unto him a bond of 40 *l.* and I tell him I will not do it, but I will make unto him a bond of 20 *l.* the court will not expound this bond to be voluntary upon this maxim, *non videtur conſenſum retinuiſſe, ſi quis ex præſcripto minantis aliquid immutavit.*

Bac. Reg. 22.

It is a rule of law, that no one can avoid a bond by averring a delivery thereof upon condition, unleſs he ſhew a writing of the condition; for as he is charged by a ſufficient writing, ſo he muſt be diſcharged by ſufficient writing, or by ſome other thing of as high authority as the obligation.

Br. faits. 10.
D. & S. cap. 12.

For the ſame reaſon, the defendant cannot aver the condition to be different from what is expreſſed in writing; but any averment conſiſtent with the condition, which ſhews the condition againſt law, will be admitted; therefore where the conſideration on which the bond is given is illegal, the defendant may take advantage of it by pleading, as ſimony, uſury, compounding of felony, *&c.* and this, notwithſtanding there be a different and legal conſideration recited in the bond.

2 Vent. 107. Godb. 29. Mo. 477.
1 Leon. 203. Fitz. 73. Hut. 52. Comb. 245. Carth. 300. 1 P. W. 189.

To debt upon bond the defendant pleaded the inſolvent debtors' act, the plaintiff replied there was no notice given him purſuant to the act, and iſſue being joined thereon, the ſummoner being dead, the duplicate of the proceedings of the juſtices was holden to be ſufficient evidence, becauſe the notice was not a matter on which to found their juriſdiction; if it had been ſo, this evidence would not have been ſufficient. But in this caſe, they are judges of the ſufficiency of proof of notice, it being part of their juriſdiction, and conſequently their duplicate of its being a good notice will be good evidence, the ſummoner being dead.

Savage and Field, M. 9 G. 2.

In an action by the aſſignee of an inſolvent debtor, the certificate made at the ſeſſions is *primâ facie* evidence of a due diſcharge, and of all the proceedings under the inſolvent act: and if there be any fraud or irregularity in the proceedings it is incumbent on the defendant to prove it.

* Laborde v. Pegus, Sittings at Weſtminſter, after Mich. 1772. Gyllom & ux' v. Stirrup, B. R. Tr. 9 G. 2. S. P

If

If the defendant to debt on bond conditioned to pay on a day certain, plead *ſolvit ad diem*, the iſſue lies upon him, and if he prove payment before the day it is ſufficient, for he could not plead it. If he were to plead it, and iſſue were joined thereon, it would be immaterial; therefore to ſuch plea the plaintiff ſhould reply, *quod non ſolvit ſecundum formam et effectum conditionis*. On the iſſue of *ſolvit ad diem* the defendant may given in evidence non-payment of intereſt for 20 years, but in ſuch caſe if the plaintiff be executor of the obligee, he will be admitted to prove an entry on the back of the bond by the teſtator of intereſt being paid. But ſuch entry ought to appear to be made before the preſumption had taken place.

Winch and Pardon, M. 3 G. 1.

Searle and Barrington, 2 Raym. 1370.

Str. 827.

To a bond of 30 years ſtanding, the defendant pleaded *ſolvit ad diem*, and relied upon the preſumption; the plaintiff proved payment of intereſt two years after the time mentioned in the condition, but gave no evidence of any ſubſequent receipt or demand; and *Raymond* Ch. Juſt. was of opinion that this plea was to be taken as ſtrictly in this caſe as in any other; and therefore the plaintiff having falſified the plea, it was not enough to ſay the other 28 years were enough to let in the preſumption, becauſe to take advantage of that the defendant ſhould have pleaded upon the act for the amendment of the law, that he paid the money after the day, in which caſe it would have been with him upon this evidence.

Str. 652. Moreland and Benet.

The caſe of *Goddard* againſt *Cox* is worthy of notice, as ſhewing who has the power of applying payments.

Str. 1194.

S. O. was indebted to the plaintiff for coals; he died and made his wife executrix: ſhe continued to deal with the plaintiff, then married the defendant, who likewiſe had coals from the plaintiff, and made ſeveral payments, generally upon account, which, if applied to the debt from the executrix, and her debt whilſt a widow, cleared both, and the preſent action was againſt the defendant only for what was delivered in his time. The queſtion was, who had a right of applying theſe payments, there being no direction from the defendant, who it was agreed had the firſt right; and Lord Ch. Juſt. *Lee* held that thereby it devolved to the plaintiff, and therefore he might apply the money to diſcharge his wife's debt, the defendant being by marriage a debtor for that; but as to the demand againſt her as executrix,

the validity of which depended on the queftion of affets, &c. he was of opinion the plaintiff could not apply any of the money to the difcharge of that demand.

6 Co. 47.

In debt againft an heir, who pleads *riens by difcent*, the obligation is admitted, but the plaintiff muft prove affets, and it fuffices if he prove affets in *Cornwall*, though they be alledged in *London*, for affets or not, is the fubftance of the iffue; or the plaintiff may prove that the land was devifed to the defendant and his heirs, charged with a rent, &c. for where the devife does not vary the limitation, the heir takes by *difcent*. And thefe and many other cafes were very lately confidered, in a cafe where the teftator feifed in fee devifed to the defendant, his heir, all his eftate real and perfonal, upon condition that he paid his debts and legacies; and a queftion was made whether he took by purchafe or *difcent*, the heir having pleaded *riens per difcent* to debt upon a bond of his anceftor; and the whole court held that the tenure and quality of the eftate not being altered, he took by *difcent*, and that charging an eftate makes no alteration as to the heir's taking in refpect of the land.

1 Raym. 728. Salk. 241.

Allam and Heber; Tr. 21 G. 2. K. B. Str. 1270.

5 Co. 60.

So if the heir take by a voluntary fettlement made by his father, which is void as to creditors, by 13 *Eliz. c.* 3.

Ld. Raym. 734.

In debt on bond againft the heir, on the iffue of *riens per difcent*, the heir may give in evidence an extent againft him upon a debt owing by his father upon bond to the king; but it will be neceffary to produce the bond itfelf, or a fworn copy of it.

Jones 88. 3. Bulft. 317. Pop. 153. Palm. 419.

Note; Where you bring a *fci. fa.* againft the heir upon a judgment on bond had againft his anceftor, you can only extend a moiety of the land defcended by elegit, for he is only chargeable as tertenant. But where you bring an action againft the heir upon the bond of his anceftor the plaintiff is intitled to take the whole land defcended in execution.

By 3 & 4 *W.* & *M. c.* 14. If the heir alien before action brought, yet he fhall be liable to the value of the land, and if he plead *riens per difcent*, the plaintiff may reply, that he had lands from his anceftor before the original writ brought, or bill filed; and if upon iffue joined thereupon it be found for the plaintiff, the jury fhall enquire the value of the lands fo defcended, and thereupon judgment fhall be given, and execution awarded as aforefaid, (*i. e.* to the value only) but if judgment be given by con-

feffion

fession of the action without confessing assets descended, or upon demurrer, or *nil dicit*, it shall be for the debt and damages without any writ, to enquire of the lands descended.

The plaintiff may join issue on the plea *riens per discent*, without replying as he is impowered by this statute, and in such case the jury are not to set out the value of the land descended, but it is sufficient for them to find that lands came by *discent* sufficient to answer the debt and damages. 1 Barnes 329.

The defendant pleaded *riens per discent al temps del original*, the plaintiff replied, that the defendant had sufficient lands before the time of the original purchased, and on issue thereon a verdict was given for the plaintiff, but no enquiry of the value of the lands, and the court awarded a repleader; issue ought not to have been joined on the sufficiency of the land descended. Jefferys v. Barrow, Pas. 12 An.

The heir cannot have two defences, one at common law, and one on the statute: therefore if to *riens per discent al temps del writ*, the plaintiff reply that before the time lands descended, the heir cannot rejoin that he sold them and paid bond debts to the amount; he ought to disclose the whole in his bar at once. Winder and Barnes, E. 13 G. 2.

Debt on bond against the defendant as brother and heir to *J. S.* upon issue *riens per discent* a special verdict that the obligor was seised in fee, had issue and died seised, and the issue died without issue, whereupon the lands descended to the defendant as heir to the son of his brother, and the court held the issue was found against the plaintiff; for the defendant hath nothing as immediate heir to his brother, and if he would charge him as collateral heir he ought to have made a special declaration. Jenks's case, Cr. Car. 151.

But if *A.* settle an estate upon himself for life, remainder to his first and other sons in tail, remainder to his own right heirs, and enter into a bond, and die leaving a son who dies without issue, whereupon the uncle enters, he may be charged as brother and heir of *A.* for he must make himself heir to him who was last actually seised.—And note, a reversion expectant upon an estate tail is not assets to charge the heir upon the general issue *riens per discent*; but a reversion expectant upon an estate for life must be pleaded specially. Kellow and Rowden, Carth. 126. Ibid.

But in debt for rent upon the plea of *nil debet*, he cannot give in evidence disbursements for necessary repairs, where the

 plaintiff

plaintiff is bound to repair, for he might have had covenant against him; but he may give in evidence, entry and eviction by the plaintiff. But if the leffor enter by virtue of a power referved, or as a mere trefpaffer, yet if the leffee be not evicted, it will be no fufpenfion of the rent.

1 Raym. 370.

1 Raym. 746.

On *nil debet* the plaintiff proved a note by which the defendant agreed to hold for a year at 15 *l.* the plaintiff was grantee of a reverfion, and the life at that time dead, but he had never been in poffeffion: the defendant was permitted to give in evidence a prior grant of the reverfion notwithftanding the note: but *Holt* Ch. Juft. faid, if the plaintiff had ever been in poffeffion, though but as tenant at will, the defendant could not give in evidence *nil habuit in tenementis*, without having been evicted. So he may plead *non demifit*, and give the fpecial matter in evidence, but if the leafe were by indenture he could not plead this plea, for an indenture concludes both parties.

Co. L. 47.

J. 320.

In debt for rent the defendant pleaded infancy at the time of the leafe made, and upon demurrer the court held the leafe voidable only at the election of the infant, by waiving the land before the rent day comes, but the defendant not having fo done, and being of age before the rent day came, the plaintiff had judgment.

Ryley v Hickes, M. 2 G. 2. per Raym.

A leafe by parol for a year and an half, to commence after the expiration of a leafe which wants a year of expiring, is a good leafe within the ftatute of frauds, for it does not exceed three years from the making.

Per Holt, at Maidftone, 1 An.

If the defendant infift that the leafe declared on is not the plaintiff's, the plaintiff may fhew it was made by *A.* who had authority from him to execute it in his name, and the authority need not be produced. But the leafe muft be made and executed in the name of the principal.

Stra. 705.

By the 32 *H.* 8. *c.* 37. The executors and adminiftrators of tenants in fee, fee tail or for life of rent fervices, rent charges, rents feck and fee farms, may bring debt for the arrearages againft the tenant who ought to have paid the fame.—For the conftruction of this ftatute, *vide ante poft* 1 *lib.* 2. *cap.* 4.—The action is local, and muft be brought where the land lies.

1 Vent. 286.

Note; *detinet* for rent againft an executor muft be brought where the leafe was made, becaufe it is for arrears in the teftator's time; but when it is in the *debet* and *detinet* for rent accrued

crued in the executor's time, it must be where the land lies, but if issue be joined it cannot be altered, because it is agreed to by the defendant.

Debt for rent against the lessee may be either where the land lies, or the deed was made, but an assignee is chargeable only on the privity of estate. Str. 776.

Debt against an executor on a judgment suggesting a *devastavit*, may be either in *Middlesex* where the judgment is entered, or in the county where the *devastavit* is laid to be. But if the defendant admit the judgment and traverse the wasting, that issue must be tried in the proper county. King and Burrel. M. 3 G. 2. C. B.

To debt upon bond, the defendant being an executor, pleaded a judgment had against him on a simple contract debt *ultra*, &c. and upon demurrer the plea was holden good, for otherwise an obligee might ruin an executor by keeping the bond in his pocket: he ought to give notice of it. Nay it has been holden, that an executor is not bound to take notice of a judgment obtained against his testator. Davis v. Monkhouse, Fitzg. 76. 1 Mod. 75. S. P. 3 Mod. 115.

The jury must answer to all they are charged with, therefore where in debt upon a charter party, whereby the defendant was to pay fifty guineas *per* month, the plaintiff declared for 500*l.* the defendant pleading that he had paid for all the time the ship was in his service, issue was joined thereon; the jury gave a verdict, that 357*l.* remained unpaid, but said nothing as to the rest of the 500*l.* and therefore on a writ of error *K. B.* reversed the judgment: and note; that in such case, if no judgment be given, a *ve. de novo* shall issue. The jury beside finding the debt ought to give damages for the detention, which is usually 1*s.* though under particular circumstances it may be more; as suppose the principal and interest due on a bond exceed the penalty, the jury ought to give the residue in damages as well as in debt upon a single bill. Str. 1089. Raym. 1521. Per Wild, J. Pasc. 29 Car. 2.

This is a proper place to take notice of the statutes for setting off mutual debts, and also to consider what is an extinguishment of a debt.

By 2 G. 2. *c.* 22. Where there are mutual debts between plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and the other party, one debt may be set against the other, and such matter may be given in evidence

on the general iſſue, or pleaded in bar, as the nature of the caſe ſhall require; ſo as at the time of his pleading the general iſſue, where any ſuch debt is intended to be inſiſted upon in evidence, notice be given of the particular ſum or debt ſo intended to be inſiſted on, and upon what account it became due; and by 8 *G.* 2. *c.* 24. mutual debts may be ſet againſt each other, notwithſtanding ſuch debts are of a different nature, unleſs in caſes, where either of the ſaid debts ſhall accrue by reaſon of a penalty contained in any bond or ſpecialty; and in all ſuch caſes the debt intended to be ſet off ſhall be pleaded in bar, in which plea ſhall be ſhewn how much is truly and juſtly due on either ſide, and in caſe the plaintiff ſhall recover, judgment ſhall be entered for no more than ſhall appear to be due after one debt ſet againſt the other.

Fowler v. Jones, Sittings at Weſtminſter. Hil. 8 G. 2.

A notice was as follows, *take notice that you are indebted to me for the uſe and occupation of a houſe for a long time held and enjoyed, and now lately elapſed.* The debt intended to have been ſet off was for rent reſerved on a leaſe by indenture, which not being mentioned in the notice could not be given in evidence; for if this had been ſhewn, the plaintiff might probably have proved an eviction, or ſome other matter to avoid the demand. Theſe notices ſhould be almoſt as certain as declarations.

Paynter v. Walker, C. B. Eaſt. 4 G. 3.

A debt due to a man in right of his wife cannot be ſet off in an action againſt him on his own bond.

Cook and Dixon, B. R. 1735.

Where the plea is of an equal ſum, there the action is barred, but if it be for a leſs ſum than for what the action is brought, the defendant muſt pray to have it ſet off.

Brown and Holyoak, 8 G. 2.

The day after the laſt act paſſed, Lord *Hardwicke*, Ch. Juſt. delivered the opinion of the court of *K. B.* that a debt by ſimple contract might by the former act have been ſet off againſt a ſpecialty debt.

Ibid.

If there be mutual debts ſubſiſting between the teſtator and *J. S.* the executor will be indemnified in ſetting off *J. S.*'s debt againſt his teſtator's without bringing an action againſt him.

Hutchinſon v. Sturges, Tr. 14 G. 2. C. B.

In debt upon bond, the defendant pleaded a greater debt in bar, upon which the plaintiff prayed to have the condition of his bond inrolled, which was to appear at *Weſtminſter*, and demurred; and it was holden that this bond was not within the 8 *G.* 2. for that ſtatute relates only to bonds conditioned to pay money, and not to bail-bonds; and it was not within the

ſtatute

ſtatute 2 *G.* 2. becauſe the plaintiff did not bring the action in his own right, but as truſtee for another, (for he was an officer in the palace court;) but if it had been given to the ſheriff, and by him aſſigned to the party, it might be otherwiſe, and then the penalty would have been conſidered as the debt, becauſe it would have depended upon 2 *G.* 2. Lofting and Stevens, Mic. 1733.

In debt on bond, the defendant craved *oyer* of the condition, which was to pay the plaintiff 10 *l.* a year during life, and then pleaded, that the plaintiff was indebted to him in the ſum of 500 *l.* for money lent, *&c.* exceeding the yearly ſums that had incurred for the annuity, and offered to ſet off as much, *&c.* and on demurrer the plea was holden good. Collins and Collins, Tr. 32 G. 2.

To *aſſumpſit* for 40 *l.* lent, *&c.* the defendant pleaded articles of agreement with mutual covenants in a penalty of 200 *l.* for performance, and ſhewed a breach whereby the penalty became due, and offered to ſet off; on demurrer the court held this plea not within the ſtatutes, for there may not be 5 *l.* juſtly due to the defendant on the balance. Nedriff and Hogan, E. 33 G. 2.

A debt barred by the ſtatute of limitations cannot be ſet off. If it be pleaded in bar to the action, the plaintiff may reply the ſtatute of limitations. If it be given in evidence on a notice of ſet-off, it may be objected to at the trial.

A. having been appointed by *B.* his attorney to receive his rents, did after his death receive rent arrear in *B.*'s life-time; *B.*'s executrix brought an action for the money in her own name; the defendant gave notice to ſet off a debt due to him from the teſtator, which was not allowed at the trial, becauſe the teſtator had never any cauſe of action againſt the defendant, for the money was not received till after his death. Shipman and Thompſon, E. 11 G. 2. C. B.

To an action on a promiſſory note of 30 *l.* the plaintiff took a verdict for the whole ſum, the defendant had at the ſame ſittings an action againſt the plaintiff for 11 *l.* to which there was a notice to ſet off the note of hand; and the court held that notwithſtanding the verdict, the note of hand might be ſet off, for if at the time of the action brought there are mutual demands, they by the ſtatute may be ſet off; and juſtice may be done by entering a *remittitur* on the firſt record as to ſo much. Baſkervil and Brown, Tr. 1 G. 3. K. B. Sittings.

The aſſignee of a bankrupt brought an action for work and labour, the defendant gave notice of a ſet-off, and at the trial produced a negotiable note given by the bankrupt antecedent to March, aſſignee of May v. Chambers, Tr. 18 G. 2.

K. B. 1 P. W. 782. S. P.

his bankruptcy to *Scott*, and *Scott's* hand was proved to the indorſement to the defendant, but no proof was given when it was indorſed, upon which the plaintiff called two witneſſes, who gave ſtrong evidence to ſhew it was after the bankruptcy; however the defendant had a verdict; but a new trial was granted, becauſe ſuch indorſee ought not to be in a better condition than the drawee, who would only have come in as a creditor under the commiſſion.

Ryal & al' aſſignees of Harveſt v. Larkin, Mic. 20 G. 2. K. B.

To an action of *indebitatus aſſumpſit* by the aſſignees of a bankrupt, for goods ſold by them to the defendant, he pleaded that *Harveſt* before his bankruptcy, (*viz.* 21 *Apr.* 1740.) was indebted to the defendant by bond in 100*l.* conditioned to pay 50*l.* which exceeded the 13 *l.* mentioned in the declaration; and upon demurrer it was holden, that the ſtatute for ſetting off mutual debts does not extend to aſſignees of bankrupts, and that theſe can never be conſidered as mutual debts, for where there are mutual debts, there muſt be mutual remedies, which is not the caſe here.

But by the 5 *Geo.* 2. *c.* 30. *ſ.* 28. Where it ſhall appear to the commiſſioners that there has been mutual credit given by the bankrupt, and any other perſon, or mutual debts between the bankrupt and any other perſon, at any time before ſuch perſon became bankrupt, the commiſſioners, or the aſſignees of the bankrupt's eſtate, ſhall ſtate the account between them, and one debt may be ſet againſt another; and what ſhall appear to be due on the balance, and no more, ſhall be claimed, or paid, on either ſide.

Abſolom and Knight, E. 16 G. 2. C. B.

In replevin, the avowant juſtified under a diſtreſs for rent; the plaintiff at *Niſi Prius* inſiſted, that there was more due to him than the rent amounted to, and *Deniſon* J. refuſed the evidence, and upon motion for a new trial, the court held that 2 G. 2. did not extend to the caſe of a diſtreſs, for that is not an action, but a remedy without ſuit; they likewiſe declared, that it did not extend to *detinue*, and the like actions of wrong.

Gower and Ux. v. Hunt, 1 B. 204.

In covenant upon an indenture for non-payment of rent, the defendant pleaded *non eſt factum*, and gave a notice of ſet-off, Mr. J. *Denton* at the aſſizes was of opinion he could not upon this iſſue; but upon a motion for a new trial, the court held the evidence ought to have been received, for the general iſſue mentioned

mentioned in the act must be understood to be any general issue, and accordingly ordered a new trial.

If a man accept a bond for a legacy, it is an extinguishment of the legacy; so if a man accept an obligation for a debt due by simple contract; otherwise for a debt due by specialty; but if a stranger give a bond for a debt due by simple contract from another, it will be no extinguishment. 6 Co. 44. 2 Leon. 110.

So if a man after an act of bankruptcy committed, give a bond for a simple contract debt, it will not so far extinguish the simple contract as to deprive the creditor of petitioning for a commission. Str. 1042.

If an infant become indebted for necessaries, and give a bond in a penalty for the money, it will not extinguish the simple contract debt, for the bond is void, *aliter* if it be a single obligation in the very sum. Cr. Bl. 920. Co. L. 172. a.

The plaintiff gave a note of hand for rent arrear, and took a receipt for it when paid, the defendant afterward distrained for the rent, the plaintiff brought trespass; and it was holden, that notwithstanding this note, the defendant might distrain, for it is no alteration of the debt till payment. But if *A.* indorse a note to *B.* for a precedent debt, and *B.* give a receipt for it as money when paid, yet if he neglect to apply to the drawer in time, and by his laches the note is lost, it will extinguish the precedent debt, and in an action he would be nonsuited. Harris and Shipway, at Monmouth, 1744, per Abney, J. Ewer and Lady Clifton, C. B. Tr. 1735. S. P. Andr. 190.

If a landlord accept a bond for the rent, this does not extinguish it, for the rent is higher, and the accepting of a security of an equal degree is no extinguishment of a debt, as a statute-staple for a bond. But a judgment obtained upon a bond is an extinguishment of it. 3 Danv. 507. 6 Co. 44.

PART III.

Containing ONE BOOK.

Of Actions given by Statute.

INTRODUCTION.

HAVING in the two former parts of this works treated of ſuch actions as are founded either upon torts or upon contract, it is now proper to take notice of ſuch actions as are given by the ſtatute law; and they are of two ſorts:

1. Such as are given to the party grieved.
2. Such as are given to the common informer.

It would be endleſs to mention all the acts of parliament that give actions; I will therefore only ſet down ſuch as are in moſt frequent uſe; taking notice likewiſe of ſuch general rules as are applicable to all actions upon ſtatutes.

CHAPTER I.

Of Actions upon the Statute of Hue and Cry.

BY the ſtatute of *Winton*, *c.* 2. the hundred within which any robbery is committed ſhall be anſwerable for the ſame.

No robbery will make the hundred liable, but that which is done openly and with force and violence; therefore if a carrier's ſon or ſervant conſpire to rob him, the hundred is not anſwerable. Stile 427.

By the ſame ſtatute, if the robbery be done within the diviſion of two hundreds, both ſhall be anſwerable. Hut. 125.

If robbers aſſault a perſon in one hundred, and he flies into another, where he is purſued and robbed, the laſt hundred is liable. 2 Salk. 615.

So if a perſon be carried out of the highway in the hundred of *A.* and robbed in a coppice in the highway in the hundred of *B.* it will be ſufficient to charge the hundred of *B.* 2 Raym. 826.

But if one be taken in the hundred of *A.* and carried into the hundred of *B.* into a manſion-houſe and robbed; or taken in the day-time in *A.* and carried to *B.* and there robbed in the night, it is not within the ſtatute; for though there be no occaſion to aver in the declaration that it was done in the highway, any more than that it was done in the day, yet it muſt be given in evidence on the trial, elſe the plaintiff will be nonſuited. Carth. 71.

Proving that the robbery was committed in a private way, will be ſufficient to charge the hundred. Far. 160.

A robbery upon the Lord's day by 29 *Car.* 2. *c.* 7. will not charge the hundred. But that ſtatute only extends to the caſe of travelling, therefore where the plaintiff was robbed in going to church on a *Sunday* he recovered. And upon any other day if there be as much light as a man's countenance might be diſcerned by, though before ſun-riſe or after ſun-ſet, the hundred ſhall be liable. So if robbers oblige the waggoner to drive his waggon from the highway by day, but do not take any thing till night. Teſhmaker v. Hund. Edmonton, M. 7 G. 1. Str. 406. 7 Co. 6. Cr. J. 106. Far. 156.

By 27 *El.* *c.* 13. No perſon ſhall have an action againſt the hundred, unleſs he ſhall, with as much convenient ſpeed as may be, give notice to ſome of the inhabitants of ſome town, village or hamlet near to the place where the robbery was committed.

in any action on any of the statutes of hue and cry more than 200 *l.* unless at the time of the robbery there be two present at least to attest the truth of his or their being so robbed.

By the same act of the 8 *Geo.* 2. the party must, before any action commenced, enter into a bond in the manner therein mentioned to the high constable of the hundred, for the payment of costs, *&c.*

By the 27 *El.* the action must be commenced within a year after the robbery committed, for which reason the plaintiff must produce a copy of the original, to shew the action commenced within the time, as also that the oath of the robbery was within 20 days before the *teste*.

By the same act, if any one of the offenders be taken by pursuit, the hundred shall not be liable, and by 8 *G.* 2. it is sufficient if he be apprehended within 40 days after notice in the Gazette. But this must be pleaded, and not given in evidence on the general issue.

Salk. 613. Carth. 147.

If a servant be robbed in the absence of his master, of his master's money, either the master or the servant may bring the action, but the servant must take the oath: but if he be robbed in the presence of his master, of his master's money, the master must bring the action, and his oath alone will be sufficient.

The party robbed may be a witness *ex necessitate*, and by 8 *G.* 2. a hundredor may likewise be a witness for the hundred.

8 R. A. 686.

If the master bring an action on the robbery of his servant, he may be a witness to prove the delivery of the money to him.

Owen 70.

The plaintiff need not prove the robbery in the place or in the parish alledged in the declaration, if it be proved within the same hundred. So hue and cry need not be proved by the plaintiff though alledged in his declaration, for it is the part of the hundred to levy it.

Per Holt. 5. An. at Maidstone.

By 27 *El. c.* 13. The inhabitants of every hundred, wherein negligence of fresh suit after hue and cry shall happen to be, shall answer the one half of the damages recovered against the hundred, *&c.* to be recovered by action of debt, *&c.* in the name of the clerk of the peace of the county, for the use of the inhabitants of the hundred in which, *&c.*

CHAPTER II.

Of Actions upon the Statute of E. 6. for not setting out of Tithe.

THE statute of the 2 & 3 *Ed.* 6. *c.* 13. directs the tithe to be fairly set out under the pain of forfeiture of treble value, without mentioning to whom; but that has been al- 2 Inst. 650. ways construed to be the proprietor of the tithe, as he is the party grieved.

In this action therefore the plaintiff must prove himself entitled to the tithe, the taking away by the defendant, and the value; but as the action is founded on the tort, the plaintiff Cr. J. 437. may declare as *firmarius vel proprietarius* without shewing any particular title.

The plaintiff declared as a farmer of the rectory of *Frihust*, Selwin and Baldy. and proved himself lessee of one *Bellow*, who was lessee to the dean and chapter to whom the rectory belonged, and produced the lease from *Bellow*, but not from the dean and chapter to him; however upon proving that he received tithe of others as farmer, it was holden sufficient by *Pemberton* Ch. Just. in *Sussex* 1682; and at the same assizes the plaintiff being farmer under Hartridge v. Gibbs. the dean and chapter of *Canterbury*, and proving he had received tithes for some years as such, it was holden sufficient without producing any lease.

So if the plaintiff claim as parson, if the title be not in question, it is sufficient if he prove himself in quiet possession; but if the title be in question, he must prove his ordination by the bishop, his institution and induction, subscription to the declaration in the act of uniformity in the presence of the bishop, &c. and his reading the 39 articles within two months, and declaring his assent to them.

Debt upon the statute against three; upon *nil debet* pleaded, Carth. 362. the jury found that the defendant *Hancock debet* 18 *l.* but *quoad* the other defendants *nil debent*; and upon motion in arrest of judgment, because it was an action of debt founded on a contract which is intire; the court held it was founded on a tort, and therefore one may be found guilty and the other acquitted, as in other actions upon torts; and upon the authority of this

case the court of *K. B.* determined the case of *Hardman* v. *Whitacre & al' M.* 22 *G.* 2. which was an action of debt against nine for keeping a lurcher contrary to 8 *G.* 1. *c.* 19. All pleaded *nil debent*, and verdict as to six, *quod debent* 5 *l.* and as to the three others *nil debent*. Only one penalty can be recovered against all. Cro. Eliz. 480.

Upon *nil debet* a lay person cannot give a *non decimando* in evidence, but the king or a spiritual person may, without shewing any cause why discharged; for it shall be intended by lawful means: But where a special verdict found that the abbot of *Abington* was seised in fee, and that he and his predecessors held it discharged, and granted it to *All Souls* college, it was holden that the prescription was personal, and determined by the alienation, and that it could not be intended to be a discharge by a real composition, it not being pleaded or found by the jury to be so. 2 Keb. 45. 1 Lev. 185.

And this leads me to take notice of the construction of the statute of 31 *H.* 8. *c.* 13. as to discharges of payment of tithe. At common law temporal persons had only two ways to discharge tithe; the first was by grant of the parson, patron and ordinary; the other by a prescription *sub modo*, but not by an absolute prescription. 2 Co. 45.

Spiritual persons had four ways of discharge. 1. Bull of the pope. 2. Composition. 3. Prescription, all which were absolute. 4. Order, *viz.* Cistertians, Templers, and Hospitallers of *Jerusalem*, and was limited to so long as the land remained in their own manurance.

Then came 31 *H.* 8. and enacted that as well the king, as all and every person which shall have any hereditaments which belonged to monasteries or other religious or ecclesiastical houses, shall retain, keep and enjoy the same according to their estates and titles, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the said late abbots, &c. occupied, possessed or enjoyed the same at the days of their dissolution.

This clause hath continued the discharge by bull, composition and order, which was before the act, and which else would have been dissolved with the spiritual bodies to which they were annexed. Hob. 297.

It hath likewise continued the discharge by prescription, which though it would otherwise have continued in the king, who

who is *persona mixta*, and therefore capable of such a discharge at common law, yet it would have failed in the case of a mere layman, such a one (as I have already said) not being allowed to plead a prescription in *non decimando*, but only in *modo decicimandi*.

It hath also created a new discharge, and that is unity of possession of the parsonage and land in one hand.

But to make this unity a good discharge within this act, it must be a perpetual one, *i. e. a tempore cujus*, &c. till the dissolution; and though it be perpetual, yet if the abbot, or his farmer, paid tithe before the dissolution, that would destroy the prescription, because it would prove there was no real discharge, for an unity by prescription is not itself a perfect discharge, but from thence the law will *prima facie* presume one, though it cannot be found; and therefore if the jury find nothing but a perpetual unity, it is found against the pleader, and therefore in pleading such an unity you must add, that *ratione inde* they held discharged of payment of tithe time out of mind, for that fixes it to the statute: yet the unity and not the conclusion must be traversed. Hob. 298. Ingram and Thackston in Scac. 1748.

From hence it appears, that if the appropriation were made within time of memory, upon the point of unity the statute will be of no avail; but in such case he may alledge the said branch of the act, and that the abbots, &c. *a tempore cujus* till the dissolution held the land discharged of tithe, and give such evidence that he may approve it, which must be *a posteriori*. 11 Co. 14.

But if the abbey were founded within memory, or the land purchased to the abbey within memory, then he cannot prescribe; but if the abbey had been time of mind, and an appropriation since, yet he may prescribe in a general discharge; for that may be, though an unity came after.

Of the other ways of discharge continued by this act, it is only necessary to say, they must be properly pleaded, for tithe of right belongs to the church, and if you will discharge a just demand, you must satisfy the court of your discharge. Hob. 296.

But note, this clause of discharge in 31 *H.* 8. extends only to such religious houses as came to the king by virtue of that act, or by 32 *H.* 8. *c.* 24. and not to such which came to him either by virtue of 27 *H.* 8. or 1 *E.* 6. 2 Co. 47. Raym. 225.

Where the discharge is by order only, it is limited to so long as the land is in the occupation of the owners, but if the land Ingram and Thackston.

 have

have never paid tithe, though it be proved never to have been in tenants' hands, yet the general preſumption of a total diſcharge ſhall prevail.

Bourſrough v. Aſton, per Dolbin J. 1693.

In debt upon the ſtatute 2 *E.* 6. the defendant pleaded not guilty, and inſiſted on the proviſo of barren lands; the caſe was, he ploughed and denſhired an ancient warren and ſheepwalk, in which were ſome furzes, and the firſt crop upon 107 acres was of the value of 240 *l.* and upon this, without more evidence, the judge thought it ſufficient to ſhew the land was not *ſuapte naturâ* barren, but profitable land.

Inſt. 656.

So if a wood be ſtubbed and grubbed, and made fit for the plough and employed thereunto, yet it ſhall pay tithe preſently, for wood ground is *terra fertilis et fœcunda.*

Stockwell and Terry, 14 July 1748.

Lord *Hardwicke* held ſuch land only within the clauſe of the ſtatute, relating to barren land, as over and above the neceſſary expence of incloſing and clearing, required alſo expence in manuring, before they could be made proper for agriculture, and therefore decreed tithe upon its being proved, that the land bore better corn than the arable land in the pariſh, without any extraordinary expence in manure, *&c.* and that it had paid tithe of milk, wood, *&c.* before.

Note; in the ſame cauſe it appearing that a *modus* of 13 *l.* was paid for the tithe of *Grange* farm, to which there was common appurtenant in the land incloſed, a parcel of which was allotted by the act for incloſing to the farm, the chancellor held the *modus* extended to ſuch incloſed land.

Wit and Bucks, Bulſ. 165.

If one do gain land from the ſea and plow it, he ſhall pay tithe, for the land is not *ſuapte naturâ* barren.

So of any other land covered with water.

Cr. E. 475. 2 Inſt. 648, 649.

This ſtatute extends only to predial tithe, *i. e. ex fructibus prædiorum ut bladu, fœnum, &c. ſeu ex fructibus arborum, ut poma, pyra, &c.* but tithe of cheeſe, milk, calves, lambs, *&c.* are not predial but mixed; and therefore in an action brought for not ſetting out tithe of cheeſe, milk, *&c.* after verdict for the plaintiff, judgment was arreſted.

CHAPTER III.

Of Actions upon 5 *Eliz.*

THE 5 *Eliz. c.* 4. enacts, That no person shall exercise any trade who has not served as an apprentice for 7 years, under the penalty of 2 *l. per* month, to be recovered by whoever will sue for the same.

None but what were trades at the time of making this statute are within it, therefore it ought to be averred in the declaration (or indictment) that it was a trade at the time of making the act, and it is a good exception in arrest of judgment, that it is not so averred; unless it be a trade within the very words of the act, and then no such averment is necessary. Salk. 611. Rex v. Monro, H. 3 G. 2.

And note; it must be averred to be a trade used within the realm (or kingdom) of *England* or *Wales* at the time of making the act. Queen v. Robinson, Tr. 13 An.

Only such trades are within the equity of the act as require skill; but whether it were a trade or not at the time of making the statute, or whether any skill be requisite to the exercise of it, is matter of fact proper for the determination of the jury. Salk. 611.

It has been objected, that the using a trade in a country village is not within the statute, and in the case of *Rex* v. *Langley H.* 6 *G.* 2. Mr. J. *Page* said he had often known indictments quashed upon such exception: However, I do not apprehend it would now be allowed: for in such case at the sittings at *Westminster* it was mentioned, but Lord Ch. J. *Lee* made slight of the objection. 1 Mod. 26. 8 Co. 129. 11 Co. 84.

On motion to quash an information against the defendant for exercising the trade of a baker without having served an apprenticeship at the parish of *S.* in *Kent*. The first objection was, that it did not appear that the offence was committed in the city, borough, or market town. Secondly, that it did not appear but that the defendant exercised this trade when the act was made. But the court held that neither the enacting part of the statute, nor the preamble, gave any foundation for the first objection, and that the offence was clearly well laid; though they said, if it came out in evidence that he followed the business only in a small village, it had been the common Ball, who, &c. v. Cobus, Tr. 30 & 31 G. 2. B. R.

practice to find for the defendant. As to the second objection, the court said, it must be presumed at this length of time, tho' the objection would have held whilst the law was recent.

Salk. 67. It has been holden that serving seven years as an apprentice beyond sea, without being bound, is sufficient, and therefore an indictment was quashed, because it only said he had not served as an apprentice *infra regnum Angliæ aut Walliam.*

Peaks and Johnson, H. 1 An. at Westminster, Salk. MSS. In an action *qui tam* for exercising a trade, the question arose What should be a service? On which *Holt* Ch. J. cited a case between *Hopkins* and *Young* in *B. R.* on a special verdict, where it was adjudged, that if a person serving seven years in the exercise of his trade to any person exercising that trade, though that person have no right to use that trade, yet being employed in it seven years, that shall be a good service though he were not an apprentice; also he said he had holden that if a woman marry a tradesman, and be employed therein seven years, and then the husband die, she may use that trade after her husband's death; and also if she marry a second husband, she may continue to exercise that trade, and if she die her husband may continue to exercise it, provided he were employed in the exercise of it seven years in his wife's life-time; he said he had mentioned all these opinions of his to the rest of the judges, who all concurred.

Rex v. Driffield, 18 G. 2. per cur'. The foregoing case shews that the construction put upon this statute has been a very liberal one in favour of defendants; however, there has been no case which has been determined to be within the act, unless there have been in some manner a service for seven years; therefore one who is a partner to a person qualified will not be within the act, unless he have served seven years. But if the defendant can in any manner prove the following of the trade for seven years, it will be sufficient without any binding (and he shall be suffered to make it out by months and weeks); yet the word *apprentice* is the very material word of the statute, and an indictment without it would be ill.

Raym. 1179. (margin note beside "by months and weeks")

Wallen v. Houlton, 1759. It has been holden to be sufficient if the defendant have followed the trade seven years as a master, without any prosecution against him with effect.

Tr. 9 G. 2. B. R. A person who follows a trade as a journeyman is not subject to the penalties of this statute, though he has not served an apprenticeship.

On

On a ſpecial verdict the caſe was, The defendant was a *Turkey* merchant, and exported woollen manufacture into *Turkey*; he employed clothiers that had ſerved apprenticeſhips to work the cloth in his own houſe at his own charge, and with his own materials; and the court held that the defendant was the trader in this caſe, becauſe he employed the reſt who were but as ſervants; they held likewiſe that this was trading within the ſtatute, for whether the utterance be within the realm, or in *Turkey*, is not immaterial. Salk. 610.

But where a ſpecial verdict found that the defendant was a money partner in the brewing trade with *Cox*, who was qualified; but that by agreement he was not to interfere in the trade, but that *Cox* had an allowance for that purpoſe, the court held it was not within the meaning of the ſtatute. Reynard v. Chaſe, Mic. 30 G. 2. K. B.

Note; Freemen and their wives cannot be witneſſes, where part of the penalty goes to the city or town corporate where the offence is committed. Rex v. Seymour, M. 6 G 2. per Raym. G. Hall.

Though the plaintiff in this action be not entitled to coſts if he recover, yet he muſt pay them if the verdict be found againſt him. Jeynes v. Stevenſon. E. 10 G. 2. C. B.

CHAPTER IV.

General Rules concerning Actions on penal Statutes.

BY 31 *El. c.* 5. it is enacted, That all actions, *&c.* brought for any forfeiture upon any penal ſtatute made or to be made, whereby the forfeiture is limited to the king, ſhall be brought within two years: And all actions upon any penal ſtatute, the benefit whereof is limited to the king and to the proſecutor, ſhall be brought within one year.

And in default of ſuch purſuit, then the ſame to be brought for the king at any time within two years after that year ended. And if any ſuit upon any penal ſtatute made or to be made, except the ſtatute of tillage, ſhall be brought after the time in that behalf before limited, the ſame ſhall be void and of none effect.

4 Mod. 144. 1 Show. 353.

Upon this ſtatute it has been holden, that if any offence prohibited by any penal ſtatute be alſo an offence at common law, the proſecution of it as an offence at common law is not reſtrained by this act. 2. That the defendant may take advantage of this ſtatute on the general iſſue, and need not plead it. 3. That the party grieved is not within this ſtatute, but may ſue as before; but *quære*, where the ſuit is firſt given to the party grieved, and then to the common informer?

Noy 71.

Carth. 232. Ld. Raym. 78.

Lookup, who, &c. v. Sir. T. Frederick. Mic. 6 G. 3.

On a caſe reſerved it appeared that the action of debt was brought on 9 *An.* *c.* 14. by a common informer againſt Sir *T. F.* for winning 525 *l.* of *G. L.* at cards. The money was loſt and paid 11 *March* 1757, and the original not ſued out till *Mic.* 1762. The court of *C. B.* held it a caſe within 31 *El.* though the action given in the firſt inſtance to the party grieved, and afterward to the common informer for himſelf and the poor of the pariſh: for ſuch action would have been within the 7 *H.* 8. and the 31 *El.* was made to narrow the time given by that ſtatute, and therefore could never mean to leave any actions unreſtrained in time; the latter part of the clauſe muſt therefore be conſtrued to extend to them.

Carth. 232.

It has been determined that ſuing out a *latitat* within the year, is a ſufficient commencement of the ſuit to ſave the limitation of time. But if the writ were not ſued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonſuited.

Morris and Harwood, Mic. 3 G. 3.

By 21 *Jac.* 1. *c.* 4. All offences againſt penal ſtatutes, for which any common informer may ground an action, *&c.* before juſtices of exciſe, *&c.* (except offences concerning recuſancy or maintenance of the king's cuſtoms, or tranſporting gold and ſilver, ammunition or wool, *&c.*) ſhall be commenced, ſued, tried, recovered and determined by action, *&c.* before the juſtices of aſſize, *&c.* or before juſtices of the county, *&c.* and the like proceſs in every popular action, *&c.* ſhall be as in actions of treſpaſs *vi et armis* at common law, and in all ſuits on penal ſtatutes the offence ſhall be laid in the proper county; and if on the general iſſue the offence be not proved in the ſame county in which it is laid, the defendant ſhall be found not guilty.

Hick's caſe, Salk. 372.

In the conſtruction of this act it has been holden, that it does not extend to any offence created ſince that ſtatute, but that where a ſubſequent ſtatute gives an action of debt or other remedy

medy for the recovery of a penalty in any court of record generally, it so far impliedly repeals 21 *Jac.* 1. However the offence must be laid within the proper county.

This statute gives no new jurisdiction to the courts therein mentioned; therefore suits for such offences, over which they have no jurisdiction before the statute, must be brought in the courts of *Westminster*.

Where by the act creating the penalty, it is to be recovered by bill, plaint or information in any of the king's courts of record, and no mention made of the quarter-sessions or assizes, the 21 *Jac.* 1. does not extend to it; for the act never meant to give a jurisdiction to the quarter sessions or assizes where they had none before. Therefore it was holden that an information did not lie at the assizes for non-residence, the penalty (by 21 *H.* 8.) being recoverable by bill, plaint or information in the king's courts. Carth. 465. Str. 1103.

In the case of *K.* v. *Martel*, *M.* 25 *Car.* 2. in an information on the 5 *Eliz.* it was holden, that it lay not originally in *K. B.* because the 21 *Jac.* 1. hath negative words, but that if it be begun originally below, the party may remove it by *certiorari* if he will, and give jurisdiction to that court, for it is a statute for the ease of the subject; but the king cannot remove it.

No suit by a party grieved is within the restraint of the statute. 1 Show. 354.

By 18 *Eliz. c.* 5. No informer shall compound or agree with any that shall offend against any penal statute for an offence committed, but after answer made in court to the suit, nor after answer but by consent of the court.

This extends only to common informers.

It extends as well to subsequent penal statutes, as to those which were in being when it was made. Hut. 35.

By that statute the common informer must sue in proper person, or by his attorney: therefore an infant cannot be a common informer, for he must sue by guardian. Maggs and Ellis, M. 25 G. 2.

A common informer cannot sue for a less penalty than the statute gives; if he do, though he have a verdict, judgment will be arrested. *Ex. gr.* If a common informer were to sue for the single value of money won at play, where 9 *An. c.* 14. gives the treble value. Cunningham v. Bennet, Tr. 1 G. 1. C. B.

A servant, in the presence, and by the command of his master, who is qualified, may kill game. Turner v. Ld. Coningsby, Mic. 1724.

In

Sh'nler v. Roberts, E. 12 G. 2. C. B.

In an action on a penal ſtatute it was moved by the defendant, that the plaintiff ſhould give ſecurity to pay the coſts, upon affidavit that he was a poor man. But the court refuſed the motion, for the ſtatute having given him power to ſue, it is a debt due to him; but if it appeared that the action was brought in a feigned name, they would oblige the real proſecutor to give ſecurity.

Walker and King, Tr. 31 G. 2.

The court will on motion give the defendant liberty to pay the penalty into court with coſts.

Hob. 218.

Wherever the action is founded on a penal ſtatute, not guilty or *nil debet* are good pleas.

Jackſon and Giſſing, Tr. 15 G. 2.

If a defendant would plead a recovery in another action for the ſame offence in bar, he muſt take care to ſet out in his plea, that the plaintiff in the other action had priority of ſuit; if he do not, his plea on demurrer will be bad, but the record of a recovery in another action, cannot be given in evidence on *nil debet*. For if it be pleaded, the plaintiff might reply *nul tiel record*, or that it was a recovery by fraud to defeat a real proſecutor, which he cannot be prepared to ſhew on the general iſſue.

Str. 701. Oct. Str. 137. 4 H. 7. c. 20.

Sewel v. Edmonton Hundred, E. 7 G. 1. C. B.

The proviſo in the *Oxford* act, 16 & 17 *Car.* 2. *c.* 8. that that act ſhall not extend to any action or information on any penal ſtatute, muſt be underſtood of popular actions and informations, and not of remedies given by ſtatute to the parties grieved.

Str. 1085.

The act of 24 *G.* 2. *c.* 18. (reciting that by the 4 & 5 *Ann.* it was enacted, that every *venire facias* ſhould be awarded out of the body of the county with a proviſo, that it ſhould not extend to any action or information upon any penal ſtatute, and that the proviſo had been found inconvenient) enacts, That every *venire facias* for the trial of any iſſue in any action or information upon any penal ſtatutes, ſhall be awarded of the body of the proper county where ſuch iſſue is triable.

If the defendant plead a prior recovery, and the plaintiff reply *per fraudem*, and ſuch recovery be found to be fraudulent, the defendant is liable to two years impriſonment by 4 *H.* 7. *c.* 20.

PART IV.

Containing ONE BOOK.

Of Criminal Prosecutions relative to Civil Rights.

INTRODUCTION.

THOUGH criminal prosecutions (as such) are not within the compass of the present work, yet there being two in which civil rights come in question, I am necessarily led to take notice of them.

I shall therefore in this book treat,

1. Of the writ of *Mandamus*.

2. Of informations in nature of *Quo Warranto*.

CHAPTER I.

Of Writs of *Mandamus*.

11 Co. Bag's case. Wheeler and Trotter, E. 8 G. 2.

THE writ of *mandamus* is a prerogative writ issuing out of the court of *K. B.* (as that court has a general superintendency over all inferior jurisdictions and persons) and is the proper remedy to enforce obedience to acts of parliament and to the king's charter, and in such case is demandable of right; but where the right is of a private nature, as to an office in which the public is not concerned, such as a deputy register, &c. it is discretionary in the court to grant or to refuse it.

2 M. 316.

Therefore in every application for a *mandamus* it must appear what the office is; and for this reason a *mandamus* to swear one who was elected to be one of the eight men of *Ashburn* court was denied, because it did not appear what the office was.

Mich. 8 G. 3.

But the court will in no case grant a *mandamus* till there has been a default; and therefore in the case of the king against the borough of St. *Ives*, where a *mandamus* was granted to the churchwardens and overseers of the poor, to make a poor's rate; the court would not grant a *mandamus* to the justices at the same time, to allow it: For they would not presume the justices would not do their duty; though the same justices had before refused to allow a rate, when a *mandamus* issued for that purpose, and had been taken up but the term before, upon an attachment for disobedience.

Rex v. Dr. Walker, E. 9 G. 2.

A *mandamus* is never granted to compel a mere ministerial officer to do his duty, neither has it ever been granted to oblige a visitor to exercise his jurisdiction.

This writ lies as well to restore one who has been unjustly removed, as to admit one who has a right; though perhaps there may be this difference between the two cases; that where it is to swear, or to admit, the court will, in case the right appear plain, grant the writ upon the first motion: but where it is to restore one who has been removed, they would first grant a rule to shew cause why such a writ should not issue.

Rex v. Churchwardens and Overseers of Clerkenwell, 8 G. 1.

And note; The rule to shew cause must be always on the same persons to whom the writ is to be directed; therefore a

rule upon churchwardens and overseers, to shew cause why a *mandamus* should not issue, directed to them and the twenty principal inhabitants of the parish was holden to be bad; however, the court upon motion gave leave to amend the rule, saying it would be good on new service.

Upon a motion for a *mandamus* to the warden of the vintners company to swear *J. S.* one of the court of assistants, the affidavit being only that he was informed by some of the court of assistants that he was elected, and no positive affidavit of an election, the court would only grant a rule to shew cause, but said, if there had been a positive affidavit of his election, they would have granted the writ in the first instance. Mich. 25 G. 2.

N. B. In this case there was an affidavit that he applied to inspect the court books, in order to see whether he were elected, and was refused; without which the court would have hardly granted a rule.

Note; Where there is a corporation by prescription, the constitution of it (as well as the parties' right) must be verified by affidavit. Where it is by charter, a copy of it must be produced at the time of making the motion. Ibid.

Where they grant a rule to shew cause, though upon shewing cause it appear doubtful, whether the party have a right or not, yet the court will issue the *mandamus*, in order that the right may be tried upon the return. Rex v. Dr. Bland, Tr. 1741.

It makes no difference by what mode the party becomes intitled to the franchise, whether by charter, prescription, or tenure; therefore where by the custom of the borough of *Midhurst*, the jury at a court baron is to present the alienation of every burgage tenement, and upon such presentment the steward is to admit the tenant, who then becomes intitled to the franchises of the borough: The jury at a court baron in 1749, having refused to present several conveyances of burgage tenements, the court granted a *mandamus* to the lord to hold a court, and to the burgesses to attend at such court and to present the conveyances. And though one *mandamus* will not lie to restore several persons, yet the court held it would lie in this case to the jury to do an act to perfect the rights of several. Rex v. Ld. Mountague, 24 G. 2.

So where by the custom, the court leet was to present to the steward the person whom the commonalty of the borough had chosen to be mayor, the court granted a *mandamus* to the steward Case of the Bor' of Christchurch, 12 G. 2.

ard to hold a court leet, and to the in-burgesses to attend at such court and to present *J. D.* who had been chosen by the commonalty.

Case of the Town of Nottingham, 23 G. 2.

And it is the same where no particular person is interested, as where by charter or prescription the corporate body ought to consist of a definite number; and they neglect to fill up the vacancies as they happen, the court will grant a *mandamus*.

But as the power of *K. B.* extends only to inforce obedience to the king's charter, there were many cases in which the court could not interpose; as where by the charter a particular day was fixed for the election of a mayor or other chief officer, and no election was had upon such a day: for in such case commanding the corporation to proceed to an election at another day, would not be inforcing obedience to the king's charter, but to authorize them to act in opposition to it; therefore the statute of 11 *G.* 1. enacted, that if no election should be had of the mayor or other chief officer upon the charter day, the corporation should not be thereby dissolved, but might meet at the town-house on the day after, and proceed to election; and if no election should be made on the charter day, nor in pursuance of that act, or being made should afterward become void, the court of *K. B.* might grant a *mandamus* requiring an election to be made.

Case of the Corporation of Orford, 9 G. 2.

This being a beneficial law for the subject, the court has been very liberal in the construction of it, therefore have granted a *mandamus* for the election of a mayor, though there had been no legal mayor for four years preceding.

Case of the Bor' of Tintagel, 9 G. 2.

So they have granted a *mandamus* where there was a mayor *de facto* at the time, it appearing clearly there had been no due election. But where it appears at all doubtful whether the prior election be not legal, the court will not grant such a *mandamus* till the validity of the prior election has been tried in a proper manner by information.

The first writ of *mandamus* always concludes with commanding obedience, or cause to be shewn to the contrary; but if a return be made to it, which upon the face of it is insufficient, the court will grant a peremptory *mandamus*, and if that be not obeyed, an attachment will issue against the persons disobeying it.

Rex v. Churchwardens and Overseers of Salop, H. 8 G. 2.

So if no return be made, the court will grant an attachment against the persons to whom the *mandamus* was directed: with this

this difference, however, that where a *mandamus* is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the *mandamus*: but where it is directed to several persons in their natural capacity, the attachment for disobedience must issue against all, though when they are before the court the punishment will be proportioned to their offence.

If the return upon the face of it be good, but the matter of it false, an action upon the case lies for the party injured, against the persons making such false return. And where the return is made by several, the action may be either joint or several, it being founded upon a tort; but if it appear upon evidence that the defendant voted against the return, but was over-ruled by a majority, the plaintiff will be nonsuited, and though the return be made in the name of the corporation, yet an action will lie against the particular persons who caused the return to be made; or if the matter concern the public government, and no particular person be so interested as to maintain an action, the court will grant an information against the persons making the return. Carth. 171. 1 Raym. 564. Salk. 374.

Note; Where several join in an application for a *mandamus*, they must all join in the action for a false return. 1 Raym. 125.

And if in such action or information the return be falsified, the court will grant a peremptory *mandamus*; however, no motion can be made for it till four days after the return of the *postea*, because the defendants have so long time to move in arrest of judgment. Salk. 430.

Note; The action must be brought in *K. B.* for if it be brought in *C. B.* though the plaintiff have judgment, the court of *K. B.* will never grant a peremptory *mandamus*, for that recites the fact *prout constat nobis per recordum*. Yet where in an action for a false return judgment was given for the defendant, and upon a writ of error judgment was reversed in the exchequer chamber, the court of *K. B.* granted a peremptory *mandamus* before judgment entered, saying it was a mandatory writ, and not a judicial writ founded upon the record. Salk. 428. 1 Raym. 126.

This was the method of proceeding at common law, but now by statute 9 *Ann.* reciting, That whereas divers persons who had a right to the office of mayors or other officers within cities, towns, corporations, boroughs and places, or to be burgesses

gesses or freemen thereof, have either been illegally turned out, or have been refused to be admitted thereto, and have no other remedy to procure themselves to be admitted or restored, than by writs of *mandamus*, the proceedings on which are very dilatory and expensive, it is enacted,

1. That a return shall be made to the first writ of *mandamus*.

2. That the persons prosecuting such writ may plead to or traverse all or any the material facts contained in the return, to which the persons making such return shall reply, take issue or demur; and such farther proceedings shall be had therein, as might have been had if the person suing such writ had brought his action on the case for a false return; and in case a verdict shall be found, or judgment given for him upon a demurrer, or by *nihil dicit*, or for want of a replication or other pleading, he shall recover damages and costs; and a peremptory writ of *mandamus* shall be granted without delay for him for whom judgment shall be given, as might have been if such return had been adjudged insufficient. And in case judgment shall be given for the persons making such return, they shall recover costs.

Post. 3. All the statutes of amendment and jeofail shall be extended to writs of *mandamus*, and the proceedings thereupon.

Salk. 434. Skin. 669. Before the act an attachment did not issue for want of a return till after a *pluries mandamus*, and after that a peremptory rule for a return, which created much expence and delay; indeed in extraordinary cases, where the court apprehended much mischief from the delay, they would require a return to the *alias*.

Str. 1051. If in a proceeding under the statute no damages are given by the jury, the want of it cannot be supplied by a writ of enquiry: But in such case the party may bring an action for a false return; for the act does not take away the party's right to bring such action, but only provides that in case damages are recovered by virtue of that act, against the persons making the return, they shall not be liable to be sued in any other action for making such return.

Rex v. Mayor and Aldermen of Nottingham, H. 25 G. 2. Salk. 374. S. P. So an information may still be moved for against the persons making the return, in such cases where no particular person is so interested as to bring an action.

N. B. The return must be filed and allowed before the information can be moved for.

It

It appears from the wording of the statute that there are many cases to which it does not extend; therefore in all those cases the proceedings must be according to the course of the common law.

Though since this act a *mandamus* is in nature of an action, and error will lie upon it, yet that has been holden to be no *supersedeas* to the peremptory *mandamus*; yet *quære* as to this, for where, after a writ of error brought upon a judgment in an action upon the case for a false return, a motion was made for a peremptory *mandamus*, it was refused, and there seems to be no essential difference between the two cases. 1 P. W. 351. Str. 983.

Having now taken a general view of this writ and the proceedings thereupon, I shall proceed to consider what will be deemed a good writ, and what a good return to it.

As to the first, what will be deemed a good writ.

1. Where the fact is to be done by part of the corporation only, (*ex. gr.* mayor and aldermen) the writ may be either directed to the whole corporation, or to the mayor and aldermen singly. But if it be to be done only by the mayor, and the *mandamus* be directed to the mayor and aldermen, it will be bad. 1 Raym. 560. Salk. 701.

2. The writ must contain convenient certainty, in setting forth the duty to be performed; but it need not particularly set forth by what authority the duty exists.

Therefore where a *mandamus* to the commissary of the archbishop of *York*, to admit a deputy register, stated *quod minus rite recusavit* to admit, it was holden sufficient, though it was objected it did not state the defendant's right to admit. Str. 896.

So a *mandamus* to the dean of the arches to grant probate to Lord *Londonderry*'s executors, setting out that the dean *juxta juris exigentiam recusavit*, was holden sufficient, though it was objected that it did not shew the dean's title to grant probate; not having set out that there were *bona notabilia*. Str. 857.

So a *mandamus*, reciting whereas there is or ought to be one bailiff and twelve capital burgesses. Rex v. the Devises, M. 7 Ann.

So a *mandamus* reciting that whereas there ought to be a common council consisting of the mayor and 24 persons chosen by the mayor and burgesses, without stating whether by charter or prescription. Rex v. Mayor and Burgesses of Nottingham, H. 25 G. 2.

5 M. 314. Note; the time for taking exception to the writ, is after the return made, and before it is moved to be filed.

2. What will be deemed a good return.

Salk. 432. 436. 1. The return muft be certain to every intent, but it may contain feveral matters, provided they be confiftent.

Salk. 434. Ibid. 433. If a writ be directed to a corporation by a wrong name, they may return this fpecial matter, and rely upon it, but if they anfwer the exigency of the writ, they cannot take advantage of the mifnomer.

Salk. 431. If the fuppofal of the writ be falfe in not truly ftating the conftitution of the corporation, it will not be fufficient for the return to ftate it truly, but they muft deny the fuppofal of the writ.

Salk. 433. *Mandamus* to fwear *A.* and *B.* churchwardens, fuggefting they were *debito modo electi*, the return was *quod non fuerunt deb. modo electi*, without faying *nec eorum alter*, and holden good, for one could not be fworn upon that writ; if both were not chofen, the writ was mifconceived. It was likewife holden that where the writ is to fwear one *deb. modo electus*, *quod non fuit deb. modo electus* is a good return; but where the writ is *electus* only, fuch a return would be nought, becaufe out of the writ and evafive.

Rex v. Jorden, 5 G. 2. If a perfon chofen alderman, burgefs, *&c.* after notice given him of his election fit by and fee the corporation fill up his vacancy, without making any claim to be admitted, this will amount to a refufal; and the mayor may, to a *mandamus* to admit him, return that he had refufed; and if iffue were joined upon that return, evidence of the fact would fupport the return.

2. Where the *mandamus* is to reftore a perfon who has been removed from an office, the return muft be very accurate in ftating the corporation's power to remove, the caufe of removal, and the due execution of the power.

11 Co. 1. As to the power of removal, it is laid down in *Bag*'s cafe, that no corporation can disfranchife a member of it before a conviction at law, unlefs they have authority fo to do either by Str. 819. charter or prefcription, though the modern opinion has been that the power of amotion is incident to the corporation. Rex v. Corporation of Doncafter, Tr. 25 G. 2. However, what power foever there may be in the corporation at large, there cannot be fuch power in any part of the corporation without charter or prefcription; therefore if a return were to fet out a removal by the common council,

cil, without shewing how they were authorized, it would be bad.

2. As to the cause of removal, any member of a corporation for any offence committed against his oath of office, and breach of his duty as a member, is removeable without any previous conviction. But there must be a previous conviction to warrant an amoval for an offence which has no immediate relation to his office, such as perjury, forgery, *&c.* Where the offence is criminal in both respects, the difference seems to be, that if it consist of one single fact, as burning the charters of the corporation, bribery, *&c.* there must be a conviction, but not where it may be considered as abstracted the one from the other; as riot and assault upon any other member, so as to obstruct the business of the corporation. Rex v. Mayor of Derby, 9 G. 2.

As to such crimes whereof a previous conviction is necessary to found the disfranchisement upon, it is the infamy of them that renders him an improper person to be continued in an office of trust; therefore if the crime for which he is convicted be such as does not carry such infamy with it, it will be no cause of disfranchisement; as if he were convicted of a single assault. Ibid.

As to what shall be said to be such a breach of duty as will be a good cause of disfranchisement, it is certain that a total desertion of the duty of his office is a good cause of amoval; but it may be difficult to determine in what particular offices a bare non-residence will amount to such a desertion.

Where offices are in perpetual execution, there must be a perpetual residence, such as that of sheriff, mayor, coroner, *&c.* But in other cases of local residence it is not necessary; as in the case of a recorder, freeman, *&c.* And it would be absurd to say that non-residence barely should be a cause of amoval, when notwithstanding such non-residence, they may do all that their duty requires. But if such persons totally desert their office, it will be a good cause of amoval. As if a recorder upon notice given to him should neglect to attend at their sessions, where he ought to attend and assist the corporation in the proceedings of justice. Rex v. Ponsonby, Mich. 25 G. 2. 4 Mod. 56. Serjeant Whitacre's Case, Salk. 434.

But in such case the return ought to be, that *recessit et officium suum reliquit*, i. e. it ought to shew a non-residence upon the office, and not barely a non-residence within the precincts of the corporation. 4 Mod. 33.

Rex v. Miles. P. 6 G. 1.

And though reſidence be made a neceſſary qualification for election, yet without an expreſs clauſe in the charter non-reſidence will not of itſelf be a cauſe of amoval.

Salk. 433.

In a *mandamus* to reſtore Sir *J. Jennings* to his office of alderman the return was, that he at an aſſembly of the corporation came, *et perſonaliter, libere et debito modo reſignavit* the office, declaring he would continue to ſerve no longer in that office, whereupon they choſe another in his room: and this declaration in a corporate aſſembly was holden good, eſpecially as the corporation accepted it, and choſe another in his room; but till ſuch election he had power to waive his reſignation. But a return that he conſented to be turned out would not be good, but if in ſuch caſe they were to return, that he reſigned, and they accepted and choſe another in his room, ſuch evidence would be ſufficient to prove it.

2 Raym. 1304.

1 Sid. 14.

If it appear upon the face of the return, that the party has no right to the office, though in other reſpects the return be bad, yet the court will not grant a peremptory *mandamus*. As where the return ſtated the office of town-clerk to be diſpoſed of *ad libitum* of the mayor, and that the mayor had appointed another; though the reaſon given for his amoval was not good, yet the court refuſed to grant a peremptory *mandamus*.

Rex v. Mayor, &c. of Newcaſtle, Mich. 21 G. 2.

So where it appeared that the perſon had deſerted his office, and that it was filled up, though it was returned that he was for that cauſe amoved by the common council, without ſtating that they had a power ſo to do either by charter or preſcription.

Salk. 435. Ibid. 429.

But though it appear by the return, that he is an officer *ad libitum*, yet if they do not return a determination of their will but ſtate particular reaſons for the amoval which are not ſufficient, the court will grant a peremptory *mandamus*.

Lord Raym. 1564.

A return that he had obſtinately and voluntarily refuſed to obey orders and laws, &c. contrary to the duty of his office and his oath, would be too general; the particular laws ought to be ſpecified.

Ibid.

So a return of a miſbehaviour in one office (*ex. gr.* chamberlain) would be no reaſon for his being amoved out of another, as that of a capital burgeſs.

Carth. 173.

There cannot be any cauſe to disfranchiſe a member of a corporation, unleſs it be for a thing done, which works to the deſtruction of the body corporate, or to the deſtruction of the liberties

liberties and privileges thereof; and not any personal offence from one member to another.

So misemploying the corporation money is no cause of amoval; because the corporation may have their action for it. 1 Raym. 226.

So razing the book; unless the razure be to the detriment of the corporation.

Note; after restitution on a peremptory *mandamus*, the party may be removed for the former cause. 2 Raym. 1283.

3. As to the execution of the power of amoval.

If the person be within summons, *i. e.* if he be resident, he must be summoned to attend and shew cause against his disfranchisement, and that he was so summoned must appear upon the return, unless it appear he was heard, for as the end of summons is, that he may be heard for himself, if he had been heard, want of summons is no objection. But if it appear upon the return, that he lived out of the limits of the corporation, it is not necessary to return that he was summoned. Salk. 428. 2 Raym. 1275. Rex v. Mayor, &c. of Newcastle, 2 G. 2. S. P. 1 Raym. 226.

Where a burgess is constituted by a patent under the common seal, he ought to be discharged in like manner.

But if by election, an entry in the book is sufficient to discharge him.

Upon a return to a *mandamus* to restore a capital burgess, it appeared, that the power of amoving a member was in the mayor and aldermen; that the whole corporation having been summoned to elect a recorder, after that election was over, the mayor and aldermen separated from the rest, and removed the plaintiff, and the removal was holden void, because there was no summons to meet as mayor and aldermen. Rex v. Corporation of Carlisle, Tr. 1 G. 1. 2 Raym. 1357. S. P.

Upon the issue of *non fuit electus major*, the constitution was admitted to be, that the mayor was chosen out of the aldermen, therefore the defendant insisted that the plaintiff should approve his being an alderman. The fact of his being chosen an alderman was this; all the common council (who were the electors) except one, met at a public-house to drink, where they were acquainted that *W.* had resigned, whereupon it was proposed to choose the plaintiff, which was objected to by two or three; however, he was sworn in, and this was holden not to be a good election, because they were not corporately assembled for want of a previous summons, and therefore it was absolutely necessary 2 Raym. 1358.

 that

that every one of the common council ſhould be preſent, and conſent.

2 Raym. 1355. So where upon evidence it appeared that the corporation met upon a particular day (purſuant to a bye law) for the election of a mayor, it was holden they could not proceed to the election of an alderman for want of ſummons, there being no cuſtom to warrant it.

2 Raym. 848. 1 Raym. 223. S. P. *N. B.* The return need not be under the ſeal of the corporation, nor need it be ſigned by the mayor; and if an action were brought againſt the mayor for a falſe return, it would be ſufficient evidence againſt him that the *mandamus* was delivered to him, and has ſuch a return, unleſs he can ſhew the contrary.

Salk. 431. A *mandamus* was directed to the mayor, bailiff and burgeſſes of *A*. The mayor made a return, and brought it into the crown office; upon which a motion was made to ſtay the filing of it, upon a ſuggeſtion that this return was made againſt the conſent of the majority, who would have obeyed the writ. But the court refuſed to enter into an examination whether the return were againſt the conſent of the majority, and ordered it to be filed, as it was made by the mayor, who was the moſt principal and proper perſon; but ſaid it might be another caſe if they were all equal parties; however, they granted an information againſt the mayor for this proceeding.

Carth. 228. In an action for a falſe return the plaintiff ſet out, that he was choſen upon the firſt of *October*, according to the cuſtom. Upon evidence it appeared, that the cuſtom was to chooſe on the 29th of *September*, and that the plaintiff was then choſen; and this was holden ſufficient to ſupport the declaration, for the day in the declaration is but form.

1 Raym. 1354. Upon the iſſue of *non fuit electus*, the plaintiff muſt prove that he received the ſacrament within a year before his election, for elſe by 13 *Car.* 2. his election is void, and he is not aided by 5 *G.* 1. *c.* 6. (which enacts that no incapacity ſhall be incurred by reaſon of ſuch omiſſion, unleſs he be removed, or a proſecution commenced within ſix months after the election) though the trial be above ſix months after the election, and though the objection were never made before the trial.

Str. 1145. The mayor of *Winchelſea* muſt be choſen out of the jurats, the plaintiff in 1739 was choſen a jurat and in 1740 he was choſen mayor: he received the ſacrament within a year before his election

election to be mayor, but not within a year before he was chosen a jurat. And on a special verdict the court held that the 5 *G.* 1. would operate so as to give him the benefit of the non-prosecution in six months with regard to the previous qualification, as otherwise he would be under some degree of disability, when the act says none shall be incurred.

CHAPTER II.

Of Informations in Nature of *Quo Warranto.*

THE crown is the fountain of all power and jurisdiction, therefore if any person or corporation take upon them to exercise any office or jurisdiction without being legally authorized so to do by the king's charter or act of parliament, the court of *K. B.* will punish them for such usurpations upon the crown; in order for which the court will call upon them to shew by what authority they claim to exercise any particular office or jurisdiction.

The old method of doing this was by the writ of *quo warranto*, but of latter times the method has been by information in nature of *quo warranto*.

By 4 & 5 *W.* & *M.* *c.* 18. No information can be filed without leave of the court.

The method of obtaining leave is by laying a proper case before the court, verified by affidavit, upon which the court will grant a rule upon the party to shew cause why an information should not be filed against him, and unless the cause shewed by him be such as puts the matter beyond dispute, the court will make the rule absolute for the information, in order that the question concerning the right may be properly determined.

Note; upon a rule to shew cause, the court will grant a rule for the inspection of books belonging to the corporation. Per Cur' Tr. 23 G. 2.

By 9 *An.* *c.* 20. in case any person shall usurp, intrude into, or unlawfully hold any of the offices or franchises mentioned in the act, the proper officer of the court may with leave of the

 court

court exhibit informations in the nature of *quo warranto*, at the relation of any perſon deſiring to proſecute the ſame, and who ſhall be mentioned in the information to be the relator; and if it ſhall appear to the court, that the ſeveral rights of divers perſons to the ſaid offices or franchiſes may properly be determined in one information, the court may give leave to exhibit one information againſt ſeveral perſons.—And the act gives coſts both to the relator and defendant.

There are many caſes not mentioned in the act, in which informations in nature of *quo warranto* will lie, for the court's power of granting ſuch informations is not founded upon that act, but that act was made for regulating the proceedings in them in certain caſes relating to corporations.

Rex v. Williams. Mic. 31 G. 2.

If it be an information at common law there is no relator, nor ought there to be judgment for coſts, but only a *capiatur pro fine*.

Rex v. Ponſonby, 25 G. 2.

There muſt be an uſer as well as a claim, in order to ſubject the party to an information, for the judgment is, that he ſhall be fined *pro uſu & uſurpatione*. But though an information will not lie for a non-uſer, yet it will be a good cauſe of amotion.

Queen v. Blagden, H. 12 An. Ca. K. B. 225.

Not guilty and *non uſurpavit* are not good pleas as appears evidently from the nature of the charge, which is to ſhew by what warrant or authority; to which thoſe pleas are no anſwer. The defendant muſt either juſtify or diſclaim.

4 Co. 78.

Where the election of mayor, aldermen, &c. is by charter given to the commonalty or burgeſſes at large, the corporation may, to avoid popular confuſion, make a bye-law to reſtrain the power of election to a ſelect number (*ex. gr.* to the mayor, and aldermen, mayor and common council, and the like) and though there be no ſuch bye-law to be found, yet conſtant uſage will be a proof that there was ſuch a one, and the court will intend it; therefore it is in daily practice to plead ſuch a ſuppoſed bye-law to an information as made at a particular time, and then upon iſſue joined thereupon ſupport it, by proving that the elections have been from about that time agreeable to ſuch ſuppoſed bye-law.

Rex v. Phillips, Tr. 1749.

But if the charter direct the mayor, aldermen, &c. to be choſen out of the burgeſſes at large, a bye-law cannot reſtrain the election, and order that the mayor, aldermen, &c.

ſhall

shall be chosen out of the common council or other select number, for such bye law would not be advantageous but prejudicial to the corporation, as it would confine them in their choice.

Hitherto I have taken notice only of such informations as are brought against particular persons for usurping offices, but this sort of information will lie likewise against persons or corporations for usurping franchises.

Therefore where the mayor and common council of *Hartford* took upon them to make strangers free of the corporation without being qualified according to the charter, the court granted an information in nature of a *quo warranto* against them, because the injured freemen of the town had no other way of remedying themselves or of trying the right. Ca. K. B. 225.

So it will lie against a private person, or against a corporation, for holding a market, or holding a court leet or other court, or for exercising any other franchise. And as the defendant must in his plea set out a title, it is necessary to observe in this place what franchises may be claimed by prescription, and in what cases it is necessary to shew a grant, or an allowance in eyre, which is tantamount to a grant.

It is laid down in *Foxley*'s case, that whatever may be gained by usage without matter of record, may be claimed by prescription, such as waifs, estrays, treasure trove, *&c.* But such things as are not forfeited but by matter of record, as felons' goods, cannot be prescribed for. 5 Co. 109. 9 Co. 24.

So a man may prescribe *tenere placita*, but not to have conuzance of pleas; therefore if the charter granting it be before time of memory, *viz.* before the 1 *R.* 1. it cannot be pleaded; but by the statute *de quo warranto* you may lay an usage time out of mind, which is an argument of an ancient grant, and shew the allowance in eyre. Salk. 183, 4.

There is a point of law which sometimes comes in question in trials of this sort of informations, which therefore ought to be taken notice of in this place, and that is the operation and effect of a new charter.

If a corporation refuse a new charter, it is void; but if they accept and put it in execution, it is good. Whether a corporation have accepted a new charter or not, is commonly matter of evidence, not of law; and proof of acting under it is proof of an acceptance. Comb. 316.

A new

Ca. K. B. 247. 253. A new charter was granted in conſideration of the ſurrender of the old one; the old one was in fact ſurrendered, but the ſurrender was not inrolled, wherefore the new one was void: but the members under both charters being the ſame, what they did being warranted by the old charter was holden good.

4 Co. 87. Ventr. 355. By accepting a new charter, granting new rights, or giving a new name of incorporation, without a ſurrender of their old charter, the corporation will not loſe any of their former franchiſes.

Rex v. Larwood, Salk. 167. By charter of *H.* 4. *Norwich* was made a county, and to have two ſheriffs to be choſen by the commonalty. *Car.* 2. by charter confirmed their former charter, but granted further that one ſheriff ſhould be choſen by the mayor, ſheriffs and aldermen only; *per Holt* Ch. Juſt. The king cannot reſume an intereſt he has already granted, unleſs the grantees concur; the corporation might have uſed this as a new grant or confirmation, but having made their elections according to it, it is evidence of their conſent to accept it as a grant.

PART V.

Containing ONE BOOK.

Of Traverses and Prohibitions.

INTRODUCTION.

THERE still remain two other species of suits which may be tried at *Nisi Prius*, and which therefore fall within the compass of this treatise; and they are traverses of inquisitions of office, and prohibitions.

CHAPTER I.

Of Traverses.

10 Co. 115. THERE are two sorts of offices; the one vests the estate and possession of the land, &c. in the king where he had only right or title before. The other is when the estate is lawfully in the king before, but the particularity of the land does not appear of record, so that it may be put in charge. The first of these is called the office of intituling; the second is called the office of instruction.

4 Co. 54. By the common law, wherever the king was in possession by virtue of the inquisition, the subject was put to his petition of right, unless the right of the party appeared in the inquisition, and then at the common law he might have a *monstrans de droit*; but where the inquisition only intitled the king, and he was obliged to bring a *sci. fa.* against the party to recover possession, there at common law the party might traverse the king's title, for there the king being in nature of a plaintiff, the party in possession might by pleading put him to prove the title upon which he would recover. But where the king was in possession by virtue of the inquisition, there the party that would get that possession from him was in nature of a plaintiff, and therefore had no method to proceed in but by way of petition; for no action could lie against the king, because no writ could issue, as he could not command himself.

But as this suit by petition was of great delay and charge to the party grieved, the statutes of 34 *E.* 3. *c.* 14. 36 *E.* 3. *c.* 13. and 2 & 3 *Ed.* 6. *c.* 8. were made to enable the subject to traverse inquisitions, or otherwise to shew their right.

3 H. 7. 3. Thus were traverses and *monstrans de droit* introduced in lieu of petitions. The only difference between the one and the other is, that in a traverse the title set up by the party is inconsistent with the king's title found by the inquisition, which he therefore must traverse; in a *monstrans de droit* he confesses and avoids the king's title. But in both cases he must make a title in himself, and if he cannot prove his title to be true, although he be able to prove that the king's title is not good, it will not serve

Stamford rerog. c. 20. p. 65. Salk. 448.

serve him. But in traverses at common law the party is in nature of a defendant, and therefore need not set up any title in himself.

The method of proceeding at common law by petition was that the king's title being found by inquisition, the party petitioned to have an inquest of office to inquire into his title; if his title was found by such office, then he came into court and traversed the king's title: so that the record began by setting out the first inquisition found for the king, after that the return of the inquisition taken upon the petition, and then went on with *et modo ad hunc diem venit* and so traversed the king's title. In conformity to these proceedings at common law, the traverse and *monstrans de droit* given by the statute begin by stating the inquisition, and then go on "*et modo ad* "*hunc diem venit, &c.*"

(Note; the only difference between the pleading in a traverse and *monstrans de droit* is, that one is *pro placito dicit*, the other *pro placito et monstratione juris dicit.*)

And from this manner of pleading, some have considered the party traversing as defendant; but when it is considered that this traverse comes in lieu of the petition at common law, and that it does not suspend the vesting in the king by the inquisition, and that the judgment for the party is an *amoveas manum*, and the judgment against him *a nil capiat*, it seems clear he ought to be deemed a plaintiff, and as such is capable of being nonsuited. Rex v. Roberts. E. 17 G. 2. Stra. 1208. Salk. 448. 4 H. 6. 12.

These proceedings are in the petty bag-office, and the record is brought from thence into the king's bench by the chancellor, in order that it may be tried. Trem. P. C. 652.

It is not clear, that a person found by inquisition to be a lunatick or ideot, can himself traverse the inquisition; however it is certain, that such traverse will not suspend the grant of the custody thereof. The practice has always been for the party to petition the chancellor for leave to traverse, and then the chancellor will upon proper grounds give such leave, and suspend the grant of the custody in the mean time. Sir J. Cutt's Case, Ley 86. Ex parte Smithie, 1728. Sir J. Knaper's Case, 10 Ann.

And it is not uncommon to grant such leave upon terms, such as upon condition that some third person who claims under conveyances from the party, will agree to be bound by the event of the traverse. And this is much for the advantage of such third person, for though he would be entitled to come in and traverse the inquisition *pro interesse suo*, yet he must do that at his Rex v. Roberts, 4 Nov. 1743. in Chanc.

his own expence; whereas where leave is given for the party to traverſe, the expence muſt be paid out of the eſtate; beſides it comes with leſs prejudice before the jury when the chancellor ſo far countenances the traverſe, as upon inſpection and enquiry to give leave for it to be carried on at the expence of the party againſt whom the inquiſition has been found.

But beſide theſe inquiſitions of office in which the king is concerned, there are others which may likewiſe be traverſed by the parties intereſted; ſuch is the inquiſition taken on the writ of *noctanter*, which is given by *Weſtminſter* 2. *c.* 26. where any one having a right to approve waſte ground makes a hedge or a ditch, and it is thrown down in the night-time, the neighbouring vills ſhall make it good at their own expence, in caſe they do not indict ſuch as are guilty, and for that purpoſe this writ commands the ſheriff to inquire into the truth of the fact, and who did it; and if the jury return that they are ignorant who did it; the return being filed in the crown-office, there goes out a writ of enquiry of damages and *diſtringas* to the ſheriff, to diſtrain the neighbouring vills to make new hedges and ditches at their own expence, and alſo to reſtore the damages, and upon this *diſtringas* the defendants may come in and traverſe the fact of the inquiſition, or they may plead that ſome of the offenders have been indicted, or traverſe that the party ſuſtained damages to the ſum found: But in other caſes of writs of enquiry of damages the party cannot traverſe the *quantum* of the damages found, becauſe he has confeſſed himſelf liable by letting judgment go againſt him; beſides he may give evidence on the writ of enquiry, becauſe he is before the court; but in this caſe the writ of enquiry is founded upon the return of the firſt inquiſition, and the parties are never before the court till they are ſo brought by the *diſtringas*, therefore have had no previous opportunity of controverting the matter.

2 Inſt.

2. L. Abr. 217.

CHAPTER II.

Of Prohibitions.

THE courts of *Westminster Hall*, having a general superintendency over all other courts, will grant a prohibition to stay the proceedings of an inferior court either *pro defectu jurisdictionis*, *pro defectu triationis*, or for proceeding as the law of the land does not warrant: And if the judge or party proceed notwithstanding the prohibition, an attachment may be had against him, or an action upon the case.

When a prohibition is moved for, the method is for the party to file a suggestion in court, stating the proceedings that have been had in the court below, and then suggesting the reason why he prays the prohibition; upon this the court grants a rule for the other party to shew cause why a writ of prohibition should not issue; and if it appear to the court that surmise is not true, or not clearly sufficient to ground the prohibition upon, they will deny it; otherwise they will make the rule absolute for the prohibition, and if the matter be doubtful, they will order the party to declare in prohibition. Hob. 67.

When the court inclines to grant the motion for a prohibition, the defendant has a sort of right to insist, that the plaintiff shall declare; but where the court inclines against the motion, the plaintiff has no such right, for there might be judgment by default, and the court be obliged to prohibit against their own opinion; and it is no injury to the plaintiff, as he may apply to another court. Rex v. Episc. Ely, Mic. 30 G. 2.

Note; Where the party is ordered to declare in prohibition, he ought not to take out the writ, but serving the other side with a rule is sufficient; and if in that suit he obtain judgment, the judgment is *stet prohibitio*, otherwise it is *quod eat consultatio*; therefore if the party be excommunicated, the mandatory part of the writ to assoil the party is not to be obeyed till after trial had. The Dean and Bishop of Wells, M. 25 G. 4.

In cases of tythe and such sort of matters where many things are in controversy, it is very frequent to order the prohibition

hibition to ſtand as to part, and a conſultation to go as to the other part.

Carter and Leeds, Mic. 2 G. 2. Where an iſſue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they ſhall give no more than 1 *s.* damages, for it is in nature of an iſſue to inform the conſcience of the court; but after he has had judgment, *quod ſtet prohibitio*, he may bring his action upon the caſe, and recover the damages he has ſuſtained.

A prohibition *pro defectu juriſdictionis* is granted as well where the inferior court has a juriſdiction, but exceeds it, as where it has no juriſdiction at all; for if the judge of ſuch inferior court do not act agreeable to the power he has, it is the ſame as if he had no juriſdiction, therefore though the court will not intermeddle with the determinations of viſitors, but preſume they have done right while they keep within their viſitatorial power, yet if they exceed it, or do not act in a regular viſitatorial manner, they will grant a prohibition. Dean and Biſhop of Glouceſter, Tr. 24 G. 2.

Smith and Bradley, E. 24 G. 2. Note; Where there is no *defectus juriſdictionis*, but only *triationis*, the defendant muſt plead it below, and have his plea diſallowed before he can be entitled to a prohibition.

As to the third cauſe for which prohibitions are grantable, the rule is, that where the eccleſiaſtical court proceeds in a matter merely ſpiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies; as in probate of wills if they refuſe one witneſs; Noy. 12. but if they have conuſance of the original matter, and an incident happen which is of temporal conuſance, or triable at Yelv. 92. common law, they muſt try it as the common law would; as in a ſuit for a legacy, if the defendant plead a releaſe or payment, they muſt admit the evidence of one witneſs; but if they admit the proof, they are to judge whether he be credi- Salk. 547. ble or not: therefore if they determine againſt his evidence, the party has no remedy but by appeal.

Note; Where a perſon is ſued in the eccleſiaſtical court for a ſeat in the church, if he would obtain a prohibition and ouſt the ordinary of juriſdiction, he muſt ſhew ſuch a legal title as cannot be tried in the eccleſiaſtical court, which can only be by preſcription, and preſcription can in ſuch caſe be no otherwiſe proved than by ſhewing repairs; therefore in a declaration

declaration in prohibition, the plaintiff regularly ought to set out a custom of repairing; but if he do not, if the defendant Comyns 368. do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unless he prove a custom to repair.

PART VI.

Containing ONE BOOK.

Of Evidence in general.

HAVING already taken notice of the ſeveral actions which may be brought, and the various defences to be made in ſuch actions; as alſo the evidence neceſſary to ſupport the ſame, it will be proper now to conſider the theory of evidence in general, and to lay down ſuch rules as are equally applicable in all cauſes. In purſuing this enquiry, I have made great uſe of Lord Chief Baron *Gilbert*'s treatiſe on the ſame ſubject: However, have endeavoured to new-model it in ſuch manner as to render it more uſeful.

Evidence is two-fold.

1. Written.
2. Not written.

Written evidence is

1. Public.
2. Private.

1. As to public; and that is likewiſe two-fold.

1. Records.
2. Matters of an inferior nature.

RECORDS are the memorials of the legiſlature and of the king's courts of juſtice, and are authentic beyond all manner of contradiction; for there can be no greater demonſtration in a court of juſtice than to appeal to its own tranſactions.

The first sort of records are acts of parliament: These are the memorials of the legislature, and therefore are the highest and most absolute proof; and they either relate to the kingdom in general, and are called general acts, or only to the concerns of private persons, and are thence called private.

A general act of parliament is taken notice of by the judges and jury without being shewed; but a particular act is not taken notice of without being shewed; for the court cannot judge of particular laws which do not concern the whole kingdom, unless that law be exhibited to the court: For they are obliged by their oaths to judge of all matters coming before them *secundum leges et consuetudinem Angliæ*, and therefore they cannot be obliged *ex officio* to take notice of a particular law, because it is not *lex Angliæ*, a law relating to the whole kingdom; and therefore, like all other private matters, it must be brought before them to judge thereon.

But a private act of parliament, or any other private record, may be brought before the jury, if it relate to the issue in question, though it be not pleaded; for the jury are to find the truth of the fact in question, according to the evidence brought before them; and therefore if the private act do evince the truth of the matter in question, it is as proper evidence to the jury as any record, or any other evidence whatever: Nay, since such records are most authentic, it is the most proper sort of evidence. Hob. 227. Cr. J. 112.

On an attaint a particular act of parliament cannot be given in evidence to the grand jury, which was not given in evidence to the petit jury; for since on the attaint the former verdict is called in question, and the jury are to be punished for the iniquity of that verdict; it follows of consequence, that no more evidence can be given than was offered to the petit jury; for they could not make any discernment but upon the evidence offered, and therefore ought not to be called in question upon different evidence. Hob. 227. Ly. 129.

But a general statute may be offered in evidence to the grand jury in an attaint, though it were not offered in evidence to the petit jury; because of a general law every person who lives under it is supposed to take notice, and by consequence the first jury in their decision were obliged to understand it, otherwise they ought to have referred it back to the decision of the court; for when the jury take upon them Hob. 227.

to judge of the whole matter, they do at their peril take upon themſelves the underſtanding of the law: And if the petit jury have judged without being appriſed of the general law of the kingdom, as they ought to be; yet that may nevertheleſs be offered to the grand jury, who may be made ſenſible of ſuch general laws on which their judgment muſt be founded.

4 Co. 76. Now the diſtinction between a general and a particular law is this; whatever concerns the kingdom in general is a general law; whatever concerns a particular ſpecies of men, or ſome individuals, is a particular law.

Hob. 227. From this definition it is plain that the ſame law may be both general and particular in different parts; *ex. gr.* 3 *Jac.* 1. againſt recuſants in general in diſabling them to preſent; yet the clauſe giving their preſentations to the univerſities is particular, and muſt be pleaded or found.

A law which concerns the king is a general law, becauſe he is the head and union of the common wealth. A law that concerns all lords is a general law, becauſe it concerns the whole property of the kingdom, it being all holden under lords mediate or immediate. But a law that concerns only the nobility, or lords ſpiritual, is a particular law, becauſe it relates to no more than one ſet of perſons; as if a law make them liable to ſuch and ſuch proceſs. Yet perhaps, if a law related to the body of the peerage, it would be deemed a general law, for as ſuch they are part of the legiſlature, and what relates to the conſtitution is a general law.

What relates to all officers in general is a general law, becauſe it concerns the univerſal adminiſtration of juſtice; as that no ſheriff or other officer ſhould take a reward for his office. But if it relate only to particular officers, and not to the adminiſtration of juſtice, it is a particular law.

What relates to all ſpiritual perſons is a general law, inaſmuch as the religion of the kingdom is the general concernment of the whole kingdom, as 21 *H.* 8. 13 *Eliz.* 10. 18 *Eliz.* 11. But what relates to one ſet of ſpiritual perſons is particular; as the act of 11 *Eliz.* of biſhops' leaſes.

An act that comprehends all trades is general, becauſe it relates to traffick in general: But an act that relates to grocers or butchers is particular.

If

If the matter of a law be ever so special, yet if it relate equally to all, it is a general law: But a law relating to some counties or parishes is special.

Though it be regularly true, that a private law shall not be taken notice of unless it be shewn, yet it will be otherwise in case such private law be recognized by a publick one: *Ex. gr.* the 23 *H.* 6. *c.* 10. relative to sheriffs' bonds is a private law, yet 4 & 5 *Ann.* having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond. Saxby v. Kirkus, Hil. 27 G. 2. K. B.

But there are some cases in which public as well as private statutes ought to be pleaded, and that is where they make void any legal solemnities; for in this case the construction of the law is not that the solemn contracts shall be deemed perfect nullities, but that they are voidable by the parties prejudiced by such contracts, and one reason of this construction arises from this rule in expounding statutes, *viz. Quisquis potest renunciare juri pro se introducto.* But if such contracts were construed to be perfect nullities, that rule must be laid aside, and the party must receive benefit by the law, whether he would or not. And therefore such acts of parliament must be pleaded, that the party may appear to take the benefit of them. Another reason of this construction is, that as what shall constitute the solemnities of a contract is matter of law, so it is matter of law how these solemnities ought to be defeated and destroyed. And inasmuch as it is matter of law by what solemnities a contract is to be constituted, therefore, when any action is founded upon any solemn contract that contract ought to be profered to the court; now it were preposterous that the law should require the contract to be offered to the court, that it may appear to be legally made; and that it should not require it to be offered to the court how it is defeated: Both certainly must be determined by the same judicature. Therefore you cannot give the act of *El.* touching usurious contracts in evidence on the general issue, though a general law, but it ought to be pleaded. So the statute of the sheriffs' bonds cannot be given in evidence on the general issue, but ought to be pleaded. So a fine is made void by the statute of *Westminster* 2. *c.* 1. but construed only to be voidable. And a recovery by a wife with a second husband is made void by 11 *H.* 8. but construed only voidable. 4 Co. 117. Hob. 72. 2 Inst. 336. 4 Co. 59.

If an action or information be brought upon a penal statute, and there be another statute that exempts or discharges the defendant from the penalty, this ought to be pleaded, and cannot be given in evidence on the general issue; for the general issue is but a denial of the plaintiff's declaration, and the plaintiff has proved him guilty, when he has proved him within the law upon which he has founded his declaration; so that the plaintiff has performed what he has undertaken: but if the defendant would exempt himself from the charge, he should not have denied the declaration, but have shewed the law that discharges him.

Another difference is taken between where the proviso in a statute is matter of fact, and where it is matter of law.

For where it is a mere matter of fact it may be given in evidence; as if an action of debt be brought against a spiritual person for taking a farm, and the defendant plead *quod non habuit nec tenuit ad firmam contra formam statuti*: The defendant may give in evidence that it was for the maintenance of his house, according to the proviso in the statute. But on an information on 5 *Ed.* 6. *c.* 14. for ingrossing, the defendant cannot upon the general issue give in evidence a licence of three justices according to the proviso, because whether there be a sufficient authority given is matter of law, and therefore cannot be given in evidence, but must be pleaded.

Godb. 145.

A saving proviso may be given in evidence on the general issue, because if the party be within the proviso, he is not guilty on the body of the act on which the action is founded.

Godb. 144.

Of general acts of parliament the printed statute book is evidence: Not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already.

But in private acts of parliament the printed statute book is not evidence, though reduced into the same volume with the general statutes: But the party ought to have a copy compared with the parliament roll; for they are not considered as already lodged in the minds of the people.

However, a private act of parliament in print that concerns a whole country, as the act of *Bedford* levels, for rebuilding

12 Mod. 216.

Tiverton,

Tiverton, &c. may be given in evidence without comparing it with the record. And these things are the rather admitted, because they gain some authority from being printed by the king's printer; and besides, from the notoriety of the subject of them they are supposed not to be wholly unknown. And for this reason printed copies of other things of as public a nature have been admitted in evidence without being compared with the original: as the printed proclamation for a peace was admitted to be read without being examined by the record in chancery.

Goodright and Skinner M. 7 G. 2. C. B.

Ca. K. B. 216.

The next thing is the copies of all other records; for they, being things to which every man has a right to have recourse, cannot be transferred from place to place to serve a private purpose, and therefore the copies of them must be allowed in evidence; a true copy being the best evidence you can have. But a copy of a copy is no evidence, for the rule demands the best evidence the nature of the thing admits, and the further off any thing lies from the first original truth, the weaker must be the evidence; besides, there must be a chasm in the proof; for it cannot appear that the first was a true copy.

Now these copies are two-fold; under seal, and not under seal.

First under seal, and they are called exemplifications, and are of better credit than any sworn copy; for the courts of justice, that put their seals to the copy, are supposed more capable to examine, and more exact and critical in their examination, than another person is or can be.

Exemplifications are two-fold; under the broad seal, and under the seal of the court.

First, under the broad seal; and such exemplifications are of themselves records of the greatest validity, and to which the jury ought to give credit under the penalty of an attaint.

When a record is exemplified under the broad seal, it must either be a record of the court of chancery, or be sent for into the court of chancery by *certiorari*, which is the center of all the courts, and from thence the subject receives a copy under the attestation of the great seal.

If letters patent be given in evidence, in which it is recited that a certain office was before granted to *J. S.* and that *J. S.* surrendered it to the king, who accepted the same, and granted it to *J. D.* this is not enough to avoid the title of *J. S.* but the record

2 R. A. 678.

record of the ſurrender muſt be ſhewn, or a true copy of it, for the recital of ſuch ſurrender is not the beſt evidence the nature of the thing will admit; and it would be of dangerous conſequence, if by ſuch ſort of ſuggeſtion, a man's title might
2 R. A. 681. be avoided. But if letters patent were given in evidence whereby, in conſideration of the ſurrender of former letters patent, the king grants a particular eſtate to the party; this would be good proof of a ſurrender, for the taking of an eſtate by the ſecond letters patent is itſelf a ſurrender of the firſt: now the ſecond letters patent are the beſt proof of taking ſuch eſtate; and then the ſurrender is by operation and conſtruction
2 Vent. 170. of law. And in the caſe firſt put, if the defendant will take advantage of the recital of a former grant as proof of ſuch former grant, he will be bound by the recital of the ſurrender; for if he will take any advantage of the recital he muſt admit the whole; but if he produce a former patent, that will put
1 Lev. 108. the plaintiff to produce the ſurrender. So if letters patent recite a former grant to another, and grant the office to commence from the determination thereof: the party claiming under the ſecond muſt produce a copy of the firſt grant, that the Court may ſee that it is determined; for there can be no other proof of the determination of the grant but the grant itſelf; though perhaps in ſuch caſe, if the recital were, that it was determined, the whole recital would be taken together.

Nothing but records exemplified under the broad ſeal may be admitted in evidence, for theſe being preſerved by the proper officer of every court from all razure and corruption, are ſuppoſed to be ſo fair and unblotted, that there can be no danger in the exemplification. But the exemplication of deeds under the broad ſeal cannot be admitted in evidence; for they being in the cuſtody of the party, and not of the law, are ſubject to razures and interlineations, and therefore ought to be produced themſelves, as the beſt evidence of the contract.

3 Inſt. 173. When any record is exemplified, the whole muſt be exemplified, for the conſtruction muſt be taken from a view of the whole taken together. However, this rule is to be taken with ſome reſtriction, as will appear by what is after ſaid concerning the giving ſworn copies of ſuch records in evidence.

Secondly, The ſecond ſort of copies under ſeal are exemplifications under the ſeal of the court, and they are of higher credit than

than a ſworn copy, for the reaſons formerly mentioned; for ſuch exemplifications can only be of the records of the court, under whoſe ſeal they are exemplified.

A recovery in the grand ſeſſions of *Wales* under the ſeal of that court may be given in evidence. 2 Sid. 145.

The ſecond ſort of copies are thoſe that are not under ſeal, and they are likewiſe two-fold. 1. Sworn copies. 2. Office copies.

Firſt, ſworn copies: theſe muſt be of the records brought into court in parchment, and not of a judgment in paper ſigned by the maſter, though upon ſuch judgment you may take out execution; for it does not become a permanent matter, till it be delivered into court, and is there fixed as a roll of the court; and, until it become a roll of the court, it is transferable any where, and ſo does not come under the reaſon of the law that permits the giving of a copy in evidence.

Where a record is loſt, a copy of it may be admitted without ſwearing it a true copy; for the record is in the cuſtody of the law, and therefore, if loſt, there ought to be no injury ariſing to the party's right, and conſequently the copy muſt be admitted without ſwearing any examination of it, ſince there is nothing with which it can be compared. But in ſuch caſes the inſtrument muſt be according to the rule required by the civil law, *vetuſtate temporis aut judiciaria cognitione roborata*. 1 Mod. 117. Salk. 285. Corvin. Dig. 292.

So the copy of a decree of tythe in *London* has often been given in evidence without proving it a true copy, becauſe the original is loſt. 1 Vent. 257.

So the copy of a recovery of lands in ancient demeſne was given in evidence where the original was loſt, and poſſeſſion had gone a long time according to the recovery. Ibid.

When a man gives in evidence a ſworn copy of a record, he muſt give the copy of the whole record in evidence, for the precedentor ſubſequent words or ſentence may vary the whole ſenſe and import of the thing produced, and give it quite another face. However, this rule admits of ſome exceptions. In caſes of inquiſitions *poſt mortem*, and ſuch private offices, you cannot read the return without alſo reading the commiſſion; but in caſes of more general concern, ſuch as the miniſter's return to the commiſſion in *H.* 8.'s time to inquire into the value of livings, it would be of ill conſequence to oblige the parties to 3 Inſt. 173. Per Hardw. Canc' in Sir Hugh Smithſon's caſe.

take

take copies of the whole record, and the commiſſion is a thing of ſuch public notoriety that it requires no proof.

Secondly, An office-copy. Here a difference is to be taken between a copy authenticated by a perſon truſted for that purpoſe, for there that copy is evidence without proof; and a copy given out by an officer of the court, who is not truſted for that purpoſe, which is not evidence without proving it actually examined.

The reaſon of the difference is, that where the law has appointed any perſon for any purpoſe, the law muſt truſt him as far as he acts under its authority; therefore the chirograph of a fine is evidence of ſuch fine, becauſe the chirographer is appointed to give out copies of the agreements between the parties that are lodged of record.

Ld. Raym. 745. If a rule of the court be produced under the hand of the proper officer, there is no need to prove it to be a true copy, for it is an original.

Where the deed is inrolled, the indorſement of the inrolment is evidence without further proof of the deed, becauſe the officer is intruſted to authenticate ſuch a deed by inrolment; but if the officer of the court make out a copy, when he is not intruſted to that purpoſe, they ought to prove it examined, becauſe being no part of his office, he is but a private man, and a private man's mere writing ought not to be credited without an oath. Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the treaſury, becauſe it is no part of the neceſſary office of ſuch clerk, for he is only intruſted to keep the records for the benefit of all men's peruſal, and not to make out copies of them. So if the deed inrolled be loſt, and the clerk of the peace make out a copy of the inrolment, that is no evidence without proving it examined; becauſe the clerk is intruſted to authenticate the deed itſelf by inrolment, and not to give out copies of the inrolment.

The office copies of deſpoſitions are evidence in chancery, but not at common law without examination with the roll; for though that court have, for their own convenience, impowered their officers to make out ſuch copies as ſhould be evidence; yet the particular rules of their courts are not taken notice of by the courts of common law, and therefore they are not evidence in thoſe courts.

Chettle and Pound, P. Aſſ. 1700. Where the fine is to be proved with proclamations (as it muſt be to bar a ſtranger) the proclamations muſt be examined with

with the roll, for the chirographer is authoriſed by the common law to make out copies to the parties of the fine itſelf, yet is not appointed by the ſtatutes to copy the proclamations, and therefore his indorſement on the back of the fine is not binding. Allen's caſe, 13 Car. 1. Clayt. 51. S. P.

Having thus ſhewed how the record is to be given in evidence by producing a copy; we muſt next inquire in what manner, and in what caſe they ought to be evidence.

1. It is regularly true, that where the record is pleaded and appears in the allegations, it muſt be tried by the court on the iſſue of *nul tiel record*, and in ſuch caſe the record itſelf muſt be produced, in caſe it be a record of the ſame court; and in caſe it be a record of another court, then an exemplification of it muſt be brought in *ſub pede ſigilli*: but to this there is this exception, that where the record is inducement and not the gist of the action, there it is not traverſable, but muſt be given in evidence on the proof of the declaration; for nothing can be of itſelf traverſable that does not make a full end of the matter, and it cannot make a full end of the matter, if fact be joined with it: in ſuch caſe therefore the iſſue muſt be upon the fact and tried by a jury, and the record may be given in evidence to ſupport the fact; and whenever a record is offered to a jury, any of the aforementioned copies are evidence.

2. As to recoveries and judgments. A *præcipe* doth not lie againſt a perſon that is not ſeiſed of the freehold; therefore when you ſhew a recovery, you muſt prove ſeiſin in the tenant to the *præcipe*: however, in an ancient recovery, ſeiſin will be preſumed, eſpecially where poſſeſſion has gone agreeably to it ever ſince; for that fortifies the preſumption, that every thing is rightly tranſacted; but in a modern recovery the ſeiſin muſt be proved, becauſe from the recency of the fact it is eaſy to be done, and the preſumption is not in ſuch caſe equally fortified by the ſubſequent poſſeſſion. 1 Mod. 117.

If there be a tenant for life, remainder in tail, and they join in a common recovery with ſingle voucher, this will not bar the tail; becauſe the *præcipe* is brought againſt both as joint-tenants, and he in remainder has no immediate eſtate of freehold, and a remainder-man is not bound by a recovery had againſt tenant for life, unleſs he come in upon the aid-prayer, or as vouchee upon a double voucher; for where any perſon is properly in court, and does not defend his title, he is barred the ſame as if he had no title at all; and when tenant in tail is barred 2 R. A. 395. Moor 256.

barred for want of title, the iſſue can never after recover in a *formedon.*

By 14 *G.* 2. *c.* 20. it is enacted, That all common recoveries ſuffered or to be ſuffered without any ſurrender of the leaſes for life, ſhall be valid. Provided it ſhall not extend to make any recovery valid, unleſs the perſon intitled to the firſt eſtate for life, or other greater eſtate, have or ſhall convey, or join in conveying an eſtate for life at leaſt to the tenant to the *præcipe.* And by the ſame act, where any perſon has or ſhall purchaſe for a valuable conſideration any eſtate, whereof a recovery was neceſſary to compleat the title, ſuch perſon, and all claiming under him, having been in poſſeſſion from the time of ſuch purchaſe, ſhall and may, after the end of twenty years from the time of ſuch purchaſe, produce in evidence the deed making a tenant to the *præcipe,* and declaring the uſes; and the deed ſo produced (the execution thereof being duly proved) ſhall be deemed ſufficient evidence that ſuch recovery was duly ſuffered, in caſe no record can be found of ſuch recovery, or the ſame ſhould appear not regularly entered: Provided, that the perſon making ſuch deed had a ſufficient eſtate and power to make a tenant to the *præcipe,* and to ſuffer ſuch common recovery. It is further enacted, That every common recovery ſuffered, or to be ſuffered, ſhall, after the expiration of twenty years, be deemed valid, if it appear upon the face of ſuch recovery that there was a tenant to the writ, and if the perſons joining in ſuch recovery had a ſufficient eſtate or power to ſuffer the ſame, notwithſtanding the deed to make a tenant to ſuch writ ſhall be loſt. It is further enacted, That every recovery ſhall be deemed valid, notwithſtanding the fine or deed making a tenant to ſuch writ ſhall be levied or executed after the time of the judgment given, and the award of ſeiſin: provided the ſame appear to be levied or executed before the end of the term in which ſuch recovery was ſuffered, and the perſons joining in ſuch recovery had a ſufficient eſtate and power to ſuffer the ſame.

Though regularly no recovery or judgment is to be admitted in evidence but againſt parties or privies, yet under ſome circumſtances they may; as in the caſe of *The King* and *Hebden,* where in an information in nature of a *quo warranto,* a judgment of *ouſter* was allowed to be given in evidence to prove the

2 Str. 1109. Andr.

ouſter

custer of a third person, the mayor by whom the defendant was admitted.

3. As to verdicts, the rule is, that no verdict shall be given in evidence, but between such who are parties or privies to it. Therefore if there be several remainders limited by the same deed, a verdict for one in remainder shall be given in evidence for one next in remainder. But if there be a recovery by verdict against tenant for life, this is no evidence against a reversioner; for the tenant for life, is seised in his own right, and that possession is properly his own, and he is at liberty to pray in aid of the reversioner or not, and the the reversioner cannot possibly controvert the matter where no aid is prayed. But if he come in upon an aid-prayer, he may have an attaint; and consequently the verdict will be evidence against him. 1 Raym. 730. Hardr. 462. Yelv. 22.

If a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial were not had for the same lands, for the verdict in such case is a very persuading evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the present jury; but then this verdict ought to be between the same parties, because otherwise a man would be bound by a decision, who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that any one should be injured by a determination, that he, or those under whom he claims, was not at liberty to controvert. But it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question, and every matter is evidence, that amounts to a proof of the point in question. Sherwin and Clarges 170.

If there be a trial of a title between *A.* lessee of *B.* and *E.* and afterwards there be a trial between *C.* lessee of *E.* and *B.* *C.* may give in evidence the verdict found against *B.* for this was the sense of a former jury on the fact, on which trial *B.* had the liberty to cross-examine; for the court will take notice that in ejectment the lessor is the real party interested, and that the lessee, (or nominal plaintiff) is a fictitious person. But a person that has no prejudice by the verdict against *B.* could never give it in evidence, though his title turn on the same point, because if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant; and if it could be no prejudice to the plaintiffs 3 Mod. 141. Hardr. 472.

tiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for no record or conviction or verdict shall be given in evidence, but such whereof the benefit may be mutual, *viz.* Such whereof the defendant, as well as the plaintiff, might have made use, and given it in evidence in case it made for him; therefore a conviction at the suit of the king for a battery cannot be given in evidence in trespass for the same battery.

Ca. K. B. 319. ante 16, p. 239.

When it is said, that a verdict may be given in evidence between the same parties, it is to be understood with this restriction, that it is of a matter which was in issue in the former cause; for otherwise it will not be allowed in evidence, because, if such verdict be false, there is no redress, and the jury are not liable to an attaint.

Hob. 53.

The exception of its being *res inter alios acta*, is not allowed against verdicts in case of customs or tolls; for the custom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well as those who have been parties to such facts or to such verdicts as have found and determined them; and in such case it is not material, whether such verdicts be recent or ancient.

Carth. 181.

A commission under the seal of the exchequer, and the inquisition taken thereon, is admissible, though not conclusive evidence: and so are depositions taken thereon, though the parties in the cause had no notice of it, nor had any opportunity of defending it.

Tooker v. Duke of Beaufort, Burr. 146.

Another case, in which this exception ought not to be allowed, is where the fact to be proved is such whereof hearsay and reputation are evidence, and therefore a special verdict between other parties stating a pedigree would be evidence to prove a descent; for in such case, what any of the family, who are dead, have been heard to say, or the general reputation of the family, entries in family books, monumental inscriptions, recital in deeds, *&c.* are allowed. And of this opinion was Mr. Justice *Wright* in the Duke of *Athol*'s case, which opinion is generally approved, though the determination by the rest of the court was contrary: perhaps founding themselves on the case of Sir *William Clarges* and *Sherwin*, where, in a trial at bar, the only question was upon the legitimacy of the Duke of *Albemarle*, and the Court would not suffer a former verdict between other parties concerning other land depending upon the same question and title to be read in evidence: but there it did not appear either from the

2 Str. 1151.

Ca. K. B. 343.

the iſſue or verdict, that the ſame queſtion was [illegible] into and determined. Beſides the giving a verdict in evidence to prove a particular fact, *viz.* that *John* had a ſon *Thomas*, is very different from giving it in evidence to ſhew the opinion of a former jury, which is only their deduction from a variety of facts proved to them.

A verdict will not be admitted in evidence without likewiſe producing a copy of the judgment founded upon it, becauſe it may happen that the judgment was arreſted, or a new trial granted; but this rule does not hold in the caſe of a verdict on an iſſue directed out of chancery, becauſe it is not uſual to enter up judgment in ſuch caſe; and the decree of the court of chancery is equally proof, that the verdict was ſatisfactory and ſtands in force. Montgomerie v. Clarke, 1745, at delegates.

4. As to writs. When a writ is only inducement to the action, the taking out the writ may be proved without any copy of it, becauſe poſſibly it might not be returned, and then it is no record; but where the writ itſelf is the giſt of the action, you muſt have a copy from the record, in as much as you are to have the utmoſt evidence the nature of the thing is capable of, and it cannot become the giſt of the action till it is returned.

In an action of treſpaſs againſt a bailiff for taking goods in execution, if it be brought by the party againſt whom the writ iſſued, it is ſufficient for the officer to give in evidence the writ of *fieri facias* without ſhewing a copy of the judgment: but if the plaintiff be not the party againſt whom the writ iſſued, but claim the goods by a prior execution (or ſale) that was fraudulent, there the officer muſt produce not only the writ, but a copy of the judgment: for in the firſt caſe, by proving that he took the goods in obedience to a writ iſſued againſt the plaintiff, he has proved himſelf guilty of no treſpaſs; but in the other caſe they are not the goods of the party againſt whom the writ iſſued, and therefore the officer is not juſtified by the writ in taking them, unleſs he can bring the caſe within 13 *Eliz.* for which purpoſe it is neceſſary to ſhew a judgment. 1 Raym. 733.

The next thing to be conſidered is all public matters that are not records; and they all come under this general definition, that they muſt be ſuch as are an evidence of themſelves, and do not expect illuſtration from any other thing; ſuch are court-rolls and tranſactions in chancery; and the copies of ſuch matters

ters may be given in evidence, in as much as there is a plain coherent proof, for there is proved upon oath a matter which if produced, would carry its own lights with it, and by confequence would need no proof.

The reafon why the proceedings in chancery are not records is this, becaufe they are not the precedents of juftice, for the judgment there is *fecundum æquum et bonum*, and not *fecundum leges et confuetudines*. And the reafon why any record is of validity and authority is, becaufe it is a memorial of what is the law of the nation; now chancery procedings are no memorials of the laws of *England*, becaufe the chancellor is not bound to proceed according to the laws.

Ld. Thanet v. Patterfon, K. B. Eaft. 12 G. 2.

If a party wants to avail himfelf of the decree only and not of the anfwer or depofitions, the decree being under the feal of the court and enrolled may be given in evidence without producing the bill and anfwer, and the oppofite party will be at liberty to fhew that the point in iffue there was not *ad idem* with the prefent iffue,

Alfo the rolls of the county courts, and the proceedings of the ecclefiaftical court, are no records, becaufe thefe courts are not derived by immediate authority from the king, but from the bifhop or the baron of the county; and there is no court declarative of the fenfe of the common law, but fuch as receive an immediate authority from the king, the perfon intrufted with the executive power of the law.

1 Sid. 221. Modern Practice is otherwife.

The bill in chancery is evidence againft the complainant, for the allegations of every man's bill fhall be fuppofed true; nor fhall it be fuppofed to be preferred by a counfel or folicitor without the party's privity, and therefore it amounts to the confeffion and admiffion of the truth of any fact, and if the counfel have mingled in it any fact that is not true, the party may have his action; but in order to make the bill evidence againft the complainant, there muft be proceedings upon it; for if there were no proceedings upon it, it fhould rather be fuppofed to be filed by a ftranger to bar the party of his evidence.

If a patron fue the parfon on a bond, and the parfon prefer his bill in chancery to be relieved, ftating it to be a fimoniacal contract; the bill and proceedings upon it may be given in evidence in an ejectment, in order to make void the parfon's living.

Fitzg. 296.

But on an iffue directed out of chancery to try the validity of a deed, where one *J. N.* was produced to prove he wrote it, by the direction of Lord *Ferrers* in 1720, and, to contradict his evidence, the plaintiffs produced a bill in chancery, preferred in 1719, by the defendant, which mentioned the deed; the Court would not fuffer it to be read, though an anfwer had been put in, becaufe it was no more than the furmifes of counfel for the better difcovery of the title.—However, in all cafes where

where the matter is ſtated by the bill as a fact on which the plaintiff founds his prayer for relief, it will be admitted in evidence, and will amount to proof of a confeſſion.

Analogous to this is a confeſſion under the party's hand by letter or otherwiſe; however, there is a great difference between the manner of giving them in evidence. A bill is proved by ſhewing there have been proceedings upon it, for it muſt be ſuppoſed to be the party's bill where his adverſary has been compelled by the proceſs of the court of chancery to anſwer it. But a confeſſion by letter muſt be proved to be of the party's hand-writing; and, where nobody ſaw the writing, that muſt be by the compariſon of hands. Now the reaſon why the compariſon of hands is allowed to be evidence is, becauſe men are diſtinguiſhed by their hand-writing as well as by their faces; for it is very ſeldom that the ſhape of their letters agree any more than the ſhape of their bodies. Therefore the likeneſs induces a preſumption that they are the ſame; and every preſumption that remains unconteſted hath the force of an evidence. But in the caſe of high treaſon compariſon of hands is not ſufficient for the original foundation of an attainder, becauſe there muſt be proof of ſome overt act, and writing is not an overt act; but it may be uſed as a circumſtantial and confirming evidence, if the fact be otherwiſe proved. And in any other criminal proſecution it will be evidence the ſame as in a civil ſuit; as on an indictment for writing a treaſonable libel, proof of the hand-writing will be ſufficient without proof of the actual writing.—The caſe of the ſeven biſhops went upon the witneſs not being enough acquainted with their hand-writing, and not upon the nature of the evidence.—In general caſes the witneſs ſhould have gained his knowledge from having ſeen the party write, but under ſome circumſtances that is not neceſſary; as where the hand-writing to be proved is of a perſon reſiding abroad, one who has frequently received letters

Ca. K. B. 72. Burr. 4 Part. 644. Taylor's caſe. 25 G. 2. at Stafford.

Gould and Jones at Weſtminſter, Tr. 2 G. 3.

letters from him in a courfe of correfpondence would be admitted to prove it, though he had never feen him write. So where the antiquity of the writing makes it impoffible for any living witnefs to fwear he ever faw the party write: As where a parfon's book was produced to prove a *modus*; the parfon having been long dead, a witnefs who had examined the parifh books, in which was the fame parfon's name, was permitted to fwear to the fimilitude of the hand-writing, for it was the beft evidence in the nature of the thing, for the parifh books were not in the plaintiff's power to produce.

Per Hardw. Canc. 6 Dec. 1746.

An admiffion of a debt, if fatisfactorily proved, is the ftrongeft evidence. But an offer to pay money by way of compromife is not evidence of a debt. The reafons often affigned for it by Lord MANSFIELD were, that it muft be permitted to men "to buy their peace" without prejudice to them if the offer did not fucceed; and fuch offers are made to ftop litigation without regard to the queftion whether any thing or what is due.—If the terms "buy their peace" are attended to, they will refolve all doubts on this head of evidence: But for an example I will add one cafe. If *A.* fue *B.* for 100*l.* and *B.* offer to pay him 20 *l.* it fhall not be received in evidence; for this neither admits or afcertains any debt, and is no more than faying he would give 20 *l.* to get rid of the action. But if an account confifts of ten articles, and *B.* admits that a particular one is due, it is good evidence for fo much.

Weftlake v. Collard and others, Bridgewater Summer Affizes, 1789. cor. Buller, J.

Admiffions of particular articles before an arbitrator are alfo good evidence, for they are not made with a view to a compromife, but the parties are contefting their different rights as much as they could do on a trial.

If the bill be evidence againft the complainant, much more is the anfwer againft the defendant; becaufe this is delivered

delivered in upon oath. But then when you read an anſwer the confeſſion muſt be all taken together, and you ſhall not take only what makes againſt him; for the anſwer is read as the ſenſe of the party himſelf, and if it be taken in this manner you muſt take it entire and unbroken; therefore if upon exceptions taken a ſecond anſwer has been put in, the defendant may inſiſt upon having that read to explain what he ſwore in his firſt anſwer. 2 Vent. 194. 288. 5 Mod. 10 1 Sid. 418.

An infant's anſwer by his guardian ſhall never be admitted as evidence againſt him on a trial at law; for the law has that tenderneſs for the affairs of infants, that it will not ſuffer him to be prejudiced by the guardian's oath. So the anſwer of a truſtee can in no caſe be admitted as evidence againſt *ceſtui que truſt*. 2 Vent. 72. 3 Mod. 259.

A bill was brought by creditors againſt an executor to have an account of a perſonal eſtate; the executor ſet forth by anſwer that there were 1100 *l.* left by the teſtator in his hands, and that coming afterward to make up accounts he gave the teſtator a bond for 1000 *l.* and the 100 *l.* were given him for his trouble and pains that he had employed in the teſtator's buſineſs, and there was no other evidence in the cauſe that the 100 *l.* were depoſited; it was argued that the anſwer, though it was put in iſſue, ſhould be allowed to diſcharge him; ſince there was the ſame rule of evidence in equity as at law: But it was anſwered and reſolved by the court that, when an anſwer was put in iſſue, whatever was confeſſed and admitted need not be proved; but it behoved the defendant to make out by proofs whatever was inſiſted upon by way of avoidance. But this was holden under this diſtinction, that where the defendant admitted a fact, and inſiſted on a diſtinct fact by way of avoidance, that he ought to prove that matter of defence, becauſe it may be probable that he admitted it out of apprehenſion, that it might be proved, and therefore ſuch admittance ought not to profit him, ſo far as to paſs for truth whatever he ſays in avoidance. But if it had been one fact, as if the defendant had ſaid the teſtator had given him a hundred pounds, it ought to have been allowed, unleſs diſproved; becauſe nothing of the fact charged is admitted, and the plaintiff may diſprove the whole fact, if he can do it. Though an anſwer is good evidence againſt the defendant, yet it is not againſt his alienee; Per Cowper C. Hil. Vac. 1707. Salk. 286.

nor is it any evidence for the defendant in a court of law (except so ordered by the court on an issue out of chancery) unless the plaintiff have made it evidence by producing it first. As where on an issue out of chancery to try the terms of an agreement, which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under a necessity of producing the bill and answer in order to read his deposition, and by that mean made the whole answer evidence, which was accordingly read by the defendant; but, where an answer in chancery of the witness was produced to shew him incompetent; he having there sworn that he had an annuity out of the land in question; serjeant *Maynard* insisted to have the answer read through, but the court refused it, as the answer was produced only to shew that he was not a competent witness in the cause, and not to prove the issue.

Bourn v. Sir Tho. Whitmore, Salop, 1747.

Sparin & al' v. Drax, M. 27 C. 2. C. B. at Bar.

Analogous to this is a man's mere voluntary affidavit, which may also be read against the person who made it: However there is great difference between the manner of giving them in evidence. An answer is proved by shewing the bill, which is the charge, and the answer which is as it were the defence, and this in civil cases shall be intended to be sworn, because the defence in chancery is upon oath. But a mere voluntary affidavit, which is no part of any cause in a court of justice, must be proved to be sworn; for if you only prove it signed by the party, the proof goes no further than to support it as a note or letter, and as such you may give it in evidence without more proof.—But if an affidavit be made in any cause, proof of such cause depending, and that such affidavit was used by the party, would perhaps be sufficient proof of its being sworn even on an indictment for perjury, and certainly would be evidence in a civil suit.

3 Mod. 36.

1 Show. 397.

A second difference between them is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot. The reason is, because the answer is an allegation in a court of judicature, and being a matter of public credit, the copy of it may be given in evidence, for the reasons formerly given: But a voluntary affidavit has no relation to a court of justice, and therefore is not intitled to public credit, and being a private matter, the affidavit itself must be produced as the best evidence; besides it must be proved to be sworn, which it cannot

be

be without it be produced; there where in an action for a malicious prosecution, the plaintiff to increase damages offered the office copy of an affidavit made by the defendant in chancery, of his being worth 2500 *l.* Lord *Raymond* refused to let it be read, and the plaintiff was obliged to send for the original which was filed in chancery. And notwithstanding the office copy of an answer may be given in evidence in a civil suit, yet it will not be sufficient on an indictment for perjury, though perhaps such copy would be sufficient for the grand jury to find the bill; But upon the trial the original must be produced, and positive proof made, that the defendant was sworn by a witness acquainted with him: But proof that a person calling himself *J. S.* was sworn, and that he signed the answer (or affidavit), and proof also by another witness of the hand-writing, would be sufficient. So an answer being brought out of the proper office, and jurat under the master's hand, and proof of its being signed by the defendant by proof of his hand-writing, is sufficient to prove it sworn by him even on an indictment for perjury: But no return of commissioners (or of a master in chancery) of the party's swearing will be sufficient, without some other proof of the identity of the person.

Chambers v. Robinson, T. 12 Geo. 1.

3 Mod. 116.

Rex v. Morris, P. 1 G. 3. K. B. Str. 1043. S. P. 3 Mod. 117.

The next thing is the depositions, and they may be read when the witness is dead, for when the witness is living, they are not the best evidence the nature of the thing is capable of.

Godb. 326.

2. They may be read when a witness is sought and cannot be found, for then he is in the same circumstances, as to the party that is to use him, as if he were dead.

3. If it be proved that a witness was subpœna'd, and fell sick by the way; for in this case likewise the deposition is the best evidence that can be had, and that answers what the law requires.

4. A deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross-examine the witness; and it is against natural justice that a man should be concluded by proofs in a cause to which he was not a party. For this reason depositions in chancery shall not be read for or against the party defendant upon an information or indictment, for the king was no party to the suit.

Ante. 16. 233.

Yet this rule admits of some exceptions; as in cases of customs and tolls, and in general in all cases where hearsay and

reputation are evidence; for undoubtedly what a witneſs, who is dead, has ſworn in a court of juſtice, is of more credit, than what another perſon ſwears he has heard him ſay:—So a depoſition taken in a cauſe between other parties will be admitted to be read to contradict what the ſame witneſs ſwears at a trial. (Sparin and Drax, M. 27 Car. 2.)

(1 Ch. Ca. 73.) Depoſitions taken thirty years ſince were admitted to be read in chancery, though the parties were not the ſame, in as much as the cauſe related to the ſame lands, and the ter-tenants were parties to it, and the witneſſes were ſince dead; the plaintiff's title then not appearing: And this is an indulgence of the chancery beyond the ſtrict rules of the common law, and it is admitted for pure neceſſity, becauſe evidence ſhall not be loſt: (Hardr. 472.) But a man ſhall not regularly take advantage of a depoſition who was not a party to the ſuit, for as he cannot be prejudiced by the depoſition, he ſhall never receive any advantage from it.

(Sir Tho. Raymond 335. 4 Mod. 147.) 5. Depoſitions before an anſwer put in are not admitted to be read, unleſs the defendant appear to be in contempt; for if there do not appear to be a cauſe depending, the depoſitions are conſidered as mere voluntary affidavits; but if the adverſe party were in contempt, the depoſitions ſhall be admitted; for then it is the fault of the objector that he did not croſs-examine the witneſſes.

(Salk. 286.) 6. If the witneſs after his depoſition taken become intereſted, his depoſition ſhall not be read; for the intent of taking ſuch depoſition is only to perpetuate his teſtimony in caſe the witneſs die.

(Hardr. 315.) 7. If a witneſs be examined *de bene eſſe*, and before the coming in of the anſwer, the defendant not being in contempt, the witneſs die, yet his depoſition ſhall not be read, becauſe the oppoſite party had not the power of croſs-examination and the rule of the common law is ſtrict in this, that no evidence ſhall be admitted but what is, or might have been, under the examination of both parties: But in ſuch caſes the way is to move the court of chancery, that ſuch a witneſs's depoſition ſhould be read, and if the court ſee cauſe they will order it, and this order will bind the parties to aſſent to the reading.

Formerly they did not inroll their bill and anſwer, and therefore ancient depoſitions may be given in evidence without the bill and anſwer; (Hob. 112.) ſo depoſitions taken by the command of queen *Elizabeth* upon petition, without bill and anſwer, were, upon a ſolemn hearing in chancery, allowed to be read.

Alſo

Alſo the ancient practice was, that they never publiſhed the depoſitions in the life-time of the witneſſes, becauſe the depoſitions *in perpetuam rei memoriam*, were of no uſe till after the death of the witneſſes; but the practice was found very inconvenient, becauſe thereby witneſſes became ſecure in ſwearing whatever they pleaſed, inaſmuch as they never could be proſecuted for perjury.

When the bill is diſmiſſed becauſe the matter is not proper for equity to decree, yet the depoſitions on the fact in the cauſe may be read afterward in a new cauſe between the ſame parties; for tho' the matter is not proper for equity to decree, yet there was a cauſe properly before the court, for it is proper for the juriſdiction of equity to conſider how far the law ought to be relaxed and moderated; and where there is a cauſe properly before the court, however that cauſe may be decided, the depoſitions muſt be evidence. But if a cauſe be diſmiſſed for the irregularity of the complaint, the depoſitions can never be read; as where a deviſee, upon a ſuit depending by his deviſor, brings his bill of revivor, and after depoſitions taken the bill is diſmiſſed, becauſe a deviſee cannot bring a bill of revivor; upon a new original bill the deviſee cannot uſe the depoſitions in the former cauſe; for there being no cauſe regularly before the court there could be no depoſition in it. 1 Ch. Ca. 175. 1 Raym. 735.

In croſs cauſes, an agreement was proved in one of the cauſes, and in that it was not ſet forth in the allegations of the bill or anſwer: In the other cauſe the agreement was ſet forth but not proved, an order was obtained before publication, that the ſame depoſitions ſhould be read in both cauſes; and this might well be, for ſince the order was before publication in the ſecond cauſe, the defendant had liberty to croſs-examine the witneſſes on what particulars he pleaſed, and the ſight of the depoſitions was to his advantage. 1 Ch. Ca. 236.

From what has been ſaid it is evident, that (as there can be no croſs-examination) a voluntary affidavit is no evidence between ſtrangers, except in ſuch caſes where a confeſſion of the perſon making the affidavit would be evidence; as where a widow came for adminiſtration, the marriage being conteſted, an affidavit of the man himſelf was read. So on an iſſue directed out of chancery to try the legitimacy of the plaintiff, the father's oath before the judges on a private bill was allowed to be evidence. Sacheverel and Sacheverel. 5 March 1716, at delegates. May and May K. B. at bar. ante 122.

2 R. A. 679. Lit. Rep. 167.

It is a general rule, that depositions taken in a court not of record shall not be allowed in evidence elsewhere. So it has been holden in regard to depositions in the ecclesiastical court, though the witnesses were dead. So where there cannot be a cross-examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence; yet if the witnesses examined on a coroner's inquest be dead, or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the public, to make enquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be fairly and impartially taken.—And by 1 & 2 *P. & M. c.* 13. and 2 & 3 *P. & M. c.* 10. Justices of the peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol-delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and these examinations shall be read against the offender upon an indictment, if the witnesses be dead.

1 Lev. 180. 2 Jones 53.

Sherwin and Clarges, M. 12 W. 3. 1 Raym. 730.

Another way of perpetuating the testimony of a person deceased, analogous to this of giving depositions in evidence, is by giving the verdict in evidence and the oath of the party deceased.—As to which the rule is, that when you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine: Besides otherwise, as you cannot regularly give the verdict in evidence, you cannot give the oath on which it is founded; for if you cannot shew there was such a cause, you cannot shew there was such a person examined in it; and without shewing there was a cause, no man's oath can be given in evidence, inasmuch as it appears to be no more than a voluntary affidavit.

Q. & v. post. 294.

What a man himself, who is living, has sworn at one trial, can never be give in evidence at another to support him, because it is no evidence of the truth; for if a man be of that ill mind to swear falsely at one trial, he may do the same at another on the same inducements: But what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him, because that shews that what he swears is not from any undue influence. But if a man have sworn at one trial different from what he has sworn at another, this is good evidence to his discredit.

A wit-

A witness was sworn in a trial at bar in *C. B.* between the same parties on the same issue, and he was subpœna'd by the defendant to appear at a second trial in *K. B.* and his charges given him, but he not appearing persons were admitted to swear what he swore in *C. B.* for the court said they would presume he was kept away by the plaintiff's practice.—This supposition was strengthened by his having been produced by the plaintiff at the former trial. Green v. Gatewick, Mic. 24 Car. 2.

On an appeal for murder the plaintiff cannot give the indictment in evidence against the prisoner, and what a person swore upon it at the trial; for as the indictment cannot be evidence (between other parties) by consequence the oath on the indictment cannot be evidence: And as the evidence on the indictment cannot be shewn by the plaintiff in the appeal, neither can it be by the defendant for the reason already given in regard to giving verdicts in evidence. 1 Sid. 325.

However to this general rule there are the same exceptions as have been already taken notice of in regard to depositions.

A verdict with the evidence given, in an action brought by the carrier for goods delivered to him to be carried, shall be given in evidence in an action brought by the owner against the carrrier for the same goods, for it is a strong proof against him that he had the plaintiff's goods; and in case the witness be dead, or cannot be found, is the best evidence that can be had, for it amounts to a confession in a court of record. Per Holt 14 W. 3. at Guildhall.

Note; though the bare producing the *postea* is no evidence of the verdict, without shewing a copy of the final judgment, because it may happen that the judgment was arrested, or a new trial granted; yet it is good evidence that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial who is since dead. So a nonsuit, with proof of the evidence upon which the plaintiff was nonsuited, may be given in evidence in another action brought by the same party. 1 Str. 162.

On an indictment for perjury committed on the trial of a former cause, the *postea* alone is sufficient evidence to prove that there was a trial, without shewing a copy of the final judgment. In *Rex* v. *Minns* the objection was made and over-ruled accordingly. Rex v. Iles, Sittings in London, Mic. 14 G. 2. cor. Raymond. Sittings at Westminster after Trin. 20 G. 3.

A decree in chancery may be given in evidence between the same parties, or any claiming under them, for their judgments must 2 Mod. 231.

3

muſt be of authority in thoſe cafes, where the law gives them a juriſdiction; for it were very abſurd that the law ſhould give them a juriſdiction, and yet not ſuffer what is done by force of that juriſdiction to be full proof.

1 Keb. 21. So a decretal order in paper with proof of the bill and anſwer (or if they are recited in the order) may be read.

And note; Wherever a matter comes to be tried in a collateral way, the decree, ſentence, or judgment of any court, eccleſiaſtical or civil, having competent juriſdiction, is concluſive evidence of ſuch matter; and in caſe the determination be final in the court of which it is a decree, ſentence or judgment, ſuch decree, ſentence or judgment, will be concluſive in any other court having concurrent juriſdiction.

Carth. 225. In conſequence of the firſt part of this rule; if in ejectment a queſtion aroſe about the marriage of the father and mother of the plaintiff, a ſentence in the eccleſiaſtical court in a cauſe of jactitation, would be concluſive evidence. So where the defendant in an action of aſſault and battery, juſtified a maihem done by him as an officer in the army for diſobeying orders, and gave in evidence the ſentence of the counſel of war upon a petition againſt him by the plaintiff, and the petition being diſmiſſed by the ſentence, it was holden to be concluſive evidence in favour of the defendant. (Dane and Degberg, H. 11 W. 3.) So in an action upon a policy of inſurance, with a warranty that the ſhip was *Swediſh*, the ſentence of a *French* admiralty court condemning the ſhip as *Engliſh* property, was holden concluſive evidence, and an exemplification of the ſentence is ſufficient evidence without further proof, 9 *Mod.* 66. (2 Show. 232.) So in an action of trover for goods, judgment of condemnation upon an information in the exchequer would be concluſive.

But this part of the rule muſt be taken with this reſtriction, that the matter determined by ſuch decree, ſentence, or judgment, was determined *ex directo*, and not in a collateral way. Therefore if in an information againſt *A.* iſſue were taken on *J. S.* being mayor of ſuch a borough in ſuch a year, and it were found he was not mayor, ſuch finding and judgment thereon would not be evidence on the like iſſue in an information againſt *B.* So if a ſuit were inſtituted in the eccleſiaſtical court by *B.* againſt *C.* for a divorce *cauſa adulterii* with *D.* and ſhe were to plead that ſhe was married to *D.* and upon proof made the court ſhould ſo pronounce, and accordingly diſmiſs *B*'s libel; yet that would be no evidence, in an ejectment in which the marriage between *C. D.* came in diſpute. (Robin's caſe in C. B. 1760.) So if in an

an ejectment between a devisee and the heir at law, the defendant obtaining a verdict upon proof that the will was not duly executed, yet he could not give it in evidence on another ejectment brought by another devisee.

In consequence of the second part of the rule, if *A.* having killed a person in *Spain* were there prosecuted, tried and acquitted, and afterward were indicted here, he might plead the acquittal in *Spain* in bar; because a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction. So in dower, if the defendant plead *ne unques accouple*, and upon this issue the bishop certify the marriage, and such certificate be enrolled, and judgment given for the demandant thereon; in the like action against any other tenant, the defendant will be concluded from pleading the like plea; for the fact having been *ex directo* determined between the parties, so that it can never again be controverted by them, the record is conclusive evidence of such fact against all the world.

Hutchinson's case, temp. Car. 2. 1 Show. 6.

Though a conviction in a court of criminal jurisdiction be conclusive evidence of the fact, if it afterwards come collaterally in controversy in a court of civil jurisdiction; yet an acquittal in such court is no proof of the reverse. As suppose the father convicted on an indictment for having two wives, this would be conclusive evidence in an ejectment, where the validity of the second marriage was in dispute. But an acquittal would not prevent the party from giving evidence of the former marriage, so as to bar the issue of the second; for an acquittal ascertains no fact as a conviction does; nor would a conviction be conclusive, so as to bar the party in a writ of dower or appeal, where the legality of the marriage comes in question. However it would be evidence before the bishop on the issue *ne unques accouple*; for though the fact of the marriage be not conclusive evidence of the legality of it, yet it is *primâ facie* a proof of it.

3 Mod. 164.

Ld. Howard v. Lady Inchiquin, 1700.

If a man devise lands by force of the statute of *H.* 8. of wills, or by custom, the probate of the will in the spiritual court cannot be given in evidence; for all the proceedings, as far as relate to lands, are *coram non judice*, for they have no power to authenticate any such devise, and therefore a copy produced under their seals is no certain evidence of a true copy.

1 R. A. 678.

But the probate of a will is good evidence as to the personal estate, because they have the custody of all wills that concern the

the perſonal eſtate, and they are the records of that court, and therefore a copy of them under the ſeal of that court muſt be good evidence; and this is ſtill the more reaſonable, becauſe it is the uſe of the court to preſerve the original wills, and only to give back to the party the copy of the will under the ſeal of the court.

Kempton and Croſs, E. 8 G. 2. K. B.

The eccleſiaſtical court never grants an exemplification of letters of adminiſtration, but only a certificate that adminiſtration was granted; therefore when a leſſee pleads an aſſignment of a term from an adminiſtrator, ſuch certificate is good evidence. So would the book of the eccleſiaſtical court, wherein was entered the order for granting adminiſtration. So would the copy of the probate of the will be evidence of *S. S.* being executor, but a copy of the will would not be evidence of it.

1 Lev. 25.

Smartle and Williams, cited by Hardw. C.

Raym. 744.

Where a perſon in ejectment would prove the relation of a father and ſon by his father's will, he muſt have the original will, and not the probate only, for where the original is in being, the copy is no evidence; beſide, the ſeal of the court does not prove it a true copy, unleſs the ſuit only related to perſonal eſtate. But the ledger book is evidence in ſuch caſe, becauſe this is not conſidered merely as a copy, but is a roll of the court; and though the law does not allow theſe rolls to prove a deviſe of lands, yet when the will is only to prove a relation, the rolls of the ſpiritual court, that has authority to inrol all wills, are ſufficient proof of ſuch teſtament. And under particular circumſtances the ledger book may be evidence even in a deviſe of a real eſtate; as where in an avowry for a rent charge, the avowant could not produce the will under which he claimed, that belonging to the deviſee of the land; but producing the ordinary's regiſter of the will, and proving former payments, it was holden, to be ſufficient evidence againſt the plaintiff, who was deviſee of the land charged. But it has been often holden, that a copy of the ledger book is not evidence; yet, ſince the original would be read as a roll of the court without further atteſtation, it ſeems fit the copy ſhould be read. The contrary practice has been founded upon the miſtake, that the ledger book is read as a copy, ſo that the copy of that is but the copy of a copy; whereas the ledger book is read as a roll of the court.

Pettit and Pettit, 1701.

Ca. K. B. 375.

Raym. 405, 1 Sid. 359.

Though in a ſuit relating to a perſonal eſtate, the probate of the will under the ſeal of the eccleſiaſtical court is ſufficient evi-

dence, yet the adverse party may give in evidence that the probate is forged, because such evidence supposes that the spiritual court has given no judgment, and so there is no reason for the temporal court to be concluded by it.—So the adverse party may prove, that the testator left *bona notabilia* against the probate by an inferior court, for then such court had no jurisdiction. Ibid.

So if letters of administration be shewn under seal, you may give in evidence that they were revoked, for this is an affirmance of the proceedings in the spiritual court, and does not at all controvert the righteousness of their decision. Ibid.

And now to take notice of other public matters, which are not records.

1. The rolls of a court baron are evidence, for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the manor court, which was anciently a court of justice relating to all property within the district.

A copy of a court-roll under the steward's hand is good evidence to prove the copyholder's estate. 1 Keb. 567. 720. Comb. 138.

So an examined copy of the court roll is good evidence, if sworn to be a true one. Comb. 337. 12 Mod. 24.

2. The register of christenings, marriages and burials, is good evidence, or the copy of it. Nay, proof *vivâ voce* of the contents of it without a copy has been admitted; yet the propriety of such evidence may well be doubted, because it is not the best evidence the nature of the thing is capable of.

Though it appear in evidence, that the register was made from a day-book, kept by the minister for that purpose, yet the day book will not be admitted to contradict the entry in the register, *ex. gr.* to prove a child base born, where no notice is taken of it in the register, which would therefore be evidence to prove him legitimate. 2 Str. 1073.

A copy of an entry in the books of the office of faculties was disallowed; *sed q.* for it is of a public nature. Ld. Raym. 745.

3. The pope's licence, without the king's, has been holden good evidence of an impropriation, because antiently the pope was taken for the supreme head of the church, and therefore was holden to have the disposition of all spiritual benefices, with the concurrence of the patron, without any regard had of the prince of the country; and these ancient matters must Palm. 527.

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be judged according to the error of the times in which they were transacted.

Palm. 38. 4. A pope's bull is evidence upon a special prescription to be discharged of tythe; where you only say that the lands belonged to such a monastery, and were discharged at the time of the dissolution, for then they continue discharged by the act of parliament; but it is no evidence on a general prescription to be discharged, because that would shew the commencement of such a custom, and a general prescription is that there was no time or memory of things to the contrary.

Hob. 188. 5. If the question be, whether a certain manor be ancient demesne or not, the trial shall be by domesday book, which will be inspected by the court.

Gregory v. Withers, H. 28 Car. 2. In ejectment for the manor of *Artam*, the defendant pleaded ancient demesne, and when domesday book was brought into court, would have proved that it was anciently called *Nettam*, and that *Nettam* appears by the book to be ancient demesne; but he was not permitted to give such evidence, for if the name be varied, it ought to have been averred on the record.

6. To know whether any thing be done in or out of the ports, there lies in the *exchequer* a particular survey of the king's ports which ascertains their extent.

7. An old terrier or survey of a manor, whether ecclesiastical or temporal, may be given in evidence, for there can be no other way of ascertaining the old tenures or boundaries.

A terrier of glebe is not evidence for the parson, unless signed by the churchwardens as well as the parson; nor then neither, if they be of his nomination; and though it be signed by them, yet it seems to deserve very little credit, unless it be likewise signed by the substantial inhabitants; but in all cases it is strong evidence against the parson.

2 Jones 224. 8. Rolls or ancient books in the *heralds' office* are evidence to prove a pedigree; but an extract of a pedigree proved taken out of records shall not, because such extract is not the best evidence in the nature of the thing, as a copy of such records might be had.

Ca. K. B. 85. Salk. 281. 9. *Camden's Britannia* would not be evidence to prove a particular custom; but a general history may be given in evidence to prove a matter relating to the kingdom in general;

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as in the case of *Neal* and *Jay* chronicles were admitted to prove, that king *Philip* did not take the stile in the deed at that time, *Charles* V. of *Spain* not having then surrendered.

10. The register of the navy office, with proof of the method there used to return all persons dead, with the mark dd. is sufficient evidence of a death. Ex dem. Whitcomb P. 6 An. C. B.

11. An inventory taken by a sheriff on an execution, is evidence between strangers to prove the quantity and value of the goods; for the law intrusting him with the execution must trust him throughout. 2 Keb. 277.

We come now in the second place to that which is only private evidence between party and party, and that is also twofold, either deeds or other matters of an inferior nature.

1. Of Deeds.

THE rule is, that when any person claims by a deed in the pleadings, he ought to make a profert of it to the court; and where he would prove any fact in issue by a deed, the deed itself must be shewn.

In every contract there must be apt words to shew what right is transferred, and to whom, and the sense and signification of these words must be expounded by the law. There must therefore be a profert made of all solemn contracts. 1. For the security of the subject, that what right is transferred may be adjudged of according to the rules of law. 2. Because all allegations in a court of justice must set forth the thing demanded; now the thing demanded cannot be set forth without shewing the instrument upon which the demand arises.

But where a man shews a good title in himself, every thing collateral to that title shall be intended, whether it be shewn or not.

A matter collateral to a title is what does not enter into the essence or being of a title, but arises *aliunde*, so that there must be a derivation of title without it. As where a man declares of a grant of feoffment of a manor, the attornment (which is collateral to the title) shall be intended. So in trespass the defendant conveyed the house in which, &c. by feoffment from *J. S.* and justified damage feasant; the plaintiff replied

Co. L. 310. Cr. E. 401. 6 Co. Bellamy's case. Cr. J. 102.

replied that *J. S.* before the feoffment made a leafe to *J. N.* who affigned to him; the defendant rejoined that the leafe was made on condition, that if *J. N.* affigned over without licence by deed from *J. S.* that then *J. S.* fhould re-enter; the plaintiff fur-rejoined that *J. S.* did by deed give licence, without making a profert of the deed; this fur-rejoinder was allowed to be good, becaufe the plaintiff's title was by affignment of the leafe from *J. N.* and confequently the licence of *J. S.* is but a matter collateral to the affignment, and by confequence the deed muft be intended to be well and legally made, though it be not fhewn to the court.

6 Co. 38. But there is another difference, and that is where the deed is neceffary *ex inftitutione legis*, and where it is neceffary *ex provifione hominis*; for where the deed is neceffary *ex inftitutione legis* there you muft fhew it; for it is repugnant that the law fhould require a deed, and not put you to fhew that deed when it is made; as if you are obliged to fhew the attornment of a corporation you muft fhew a deed, in as much as incorporate bodies by the rules of law cannot act but by incorporate inftruments; therefore no attornment is fhewn unlefs a deed be fhewn alfo. But where a deed is neceffary *ex provifione hominis*, there when it is collateral, as in the cafe of a licence before mentioned, it need not be fhewn; for the private act of the parties fhall not controul the judgment of the law, that intends all fuch collateral matters without fhewing.

Co. L. 267. 10 Co. 92. Nor can privies in eftate take any advantage of a deed without fhewing it; as if there be tenant for life, remainder in fee, and there be a releafe to him in remainder, tenant for life cannot take advantage of it without fhewing the deed; for fince the right paffes merely by the deed, to fay any perfon releafed without fhewing the deed, would not be a good plea.

And to explain this matter further, a difference is to be taken between things *that* lie in livery and things that lie in grant; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant regularly a deed muft be fhewn.

2 R. A. 682. Therefore a man may plead that *J. S.* infeoffed him without faying *per indenturam*, and yet give the indenture in evidence, becaufe the feoffment is made by the livery, and the indenture is only evidence of fuch feoffment. But if a man plead that *J. S.* infeoffed him by deed, it may reafonably be doubted,

Co. L. 281.

whether

Whether he can give a parol feoffment in evidence, because he has bound himself up to a feoffment by deed.

And though since the statute of frauds the ceremony of livery only is not sufficient to pass an estate of freehold or term of years, but there may be a deed or note in writing, yet it is not necessary to set out such conveyance in the pleadings, for they are as they were formerly, *feoffavit et demisit*.

A man may plead a condition to determine an estate for years without deed, for it begins without any livery, and therefore the party is not estopped by any notorious ceremony from averring the condition: but where a man sets out a feoffment, the other party may reply that it was by deed, and shew the condition, for then there is an estoppel against an estoppel, and so the matter is in equal balance, and therefore must be determined according to truth.

Things that lie in grant are all rights; as fairs, markets, advowsons, and rights to land where the owner is out of possession; and as they cannot visibly be delivered over, therefore they must pass by the next sort of conveyance, that holds the second place in point of solemnity, and that is by grant under the hand and seal of the party. Co. L. 225.

Now a person that claims any thing lying in grant must shew his deeds, or otherwise he must prescribe in the thing he pretends to, and the prescription being supposed immemorial, supplies the place of a grant. 10 Co. Dr. Lifield's case.

He also that has a particular estate by agreement of parties, must shew not only his own conveyance but the deeds paramount, for there can be no title made to a thing lying in agreement, but by shewing such agreement up to the first original grant. 10 Co. 93.

But where any persons claim any particular estate by act in law, they may make their claim without shewing their deeds; as tenant in dower, or by elegit, or guardian in chivalry, may claim an estate in a thing lying in grant without shewing the deed, for when the law creates an estate, and yet does not give the particular tenant the property of the deeds, it must allow the estate to be demanded without them. 10 Co. 94.

So they may plead a condition without shewing the deed, because they claim an estate by act of law, and therefore are not estopped by the act of livery, and therefore they may claim an estate defeated by the condition without a deed. Co. L. 225.

10 Co. 94. But tenant by the curtesy cannot claim any estate lying in grant without the deed, because he has the property in, and custody of the deeds in right of his wife, and that property cannot be divested out of him during the continuance of his estate.

So also he cannot defeat an estate of freehold without shewing the deed, for the act of livery is an estoppel that runs with the land, and bars all people to claim it by virtue of any condition, without the condition appear in a deed, and since the custody of the deed resides with him he must shew the deed.

But where a person is an utter stranger to any deed, there in pleading he is not compelled to shew it. As if a man mortgage his land, and the mortgagee let the land for a year, reserving rent, and then the condition be performed, and the mortgagor re-enter; the lessee in bar of an action of debt may plead the condition and re-entry without shewing the deed, for the lessee was never entitled to the custody of the deed.

So if a man bring a *præcipe* against him, he may plead that he was only a mortgagee, and that the condition was performed, so that he has no longer seisin of the estate, and this without shewing the deed; for upon performance of the condition the property of the deed is no longer in the mortgagee, but it ought to be rebailed to the mortgagor.

So if in action of waste, or in discharge of the ancestor's rent, the tenant plead a grant of the reversion and attornment after, he need not shew such grant.

Co. L. 226. 5 Co. 75. As no party shall take advantage of his own negligence in not keeping of his deeds, which in all cases ought to be fairly produced to the court; so his adversary shall not take any advantage in his violent detaining of them; for the one by the violent taking away of the deeds gives a just excuse to the other for not having them at command; and no man can ever take advantage of his own injury, and therefore it is a good plea for one party to say, that the other entered and took away the chest in which the deeds were.

Co. L. 225. b. Letters patent inrolled in the same court, or records of the same court, need not be profered to the court, but a deed inrolled must; for all records that are public acts, and that lie for the direction of that court in matters of judicature, must be taken notice of, and therefore they need not be referred to with a *prout*

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patet per recordum, for the court will take notice of the course and orders of the court upon reference to them. The deeds inrolled are no more than the private acts of the parties authenticated by the court, and they do not lie for the direction of the court, but take hold of the authority of the court to give them credit, and therefore the court does not take notice of them unless they be pleaded.—But by 10 *Ann. c.* 18. where any bargain and sale inrolled is pleaded with a profert, the party to answer such profert, may produce a copy of the inrolment.

Since the term to avoid entering the several continuances of business is reckoned as one continued law day; therefore the deeds pleaded shall be in the custody of the law during the whole term, being the day wherein they are pleaded; and being then before the court, any body may take advantage of them; but since they belong to the custody of the party, if the deed be not denied, it shall go back to the party after the term is over, and then no body can take advantage of it without a new profert. Therefore the plaintiff in *K. B.* may take advantage of the condition of a deed in his replication, because it runs, *et prædict'* A. *dicit,* as of the same term; but he cannot take advantage in his replication of a deed in *C. B.* because they enter an imparlance to another term. But where the deed comes in and is denied, it remains in court till the plea is determined; therefore while it is tied up to one court, and is impossible to be removed, it shall be pleaded in another without shewing. And if on the issue of *non est factum* it be found against the deed, it shall be kept in court for ever, to hinder any more use being made of it.

5 Co. 74. Co. L. 231. b. Salk. 215.

In an action of debt upon bond, it is matter of substance to make a profert of the deed, because it is the contract on which the court ought to found their judgment, and therefore it ought to be exhibited to the court. But it is not matter of substance to shew letters of administration, for whether they be legally granted or not belongs to the cognizance of the spiritual court, and therefore their legality cannot be weighed at common law.

Cr. J. 32. 2 Saund.

Wherever the plaintiff is bound to make a profert, the defendant is by law intitled to *oyer,* nor can the court upon any pretence dispense with the giving of it.

Str. 1186.

Secondly, Of giving deeds in evidence to the jury.

And the general rule is, that the deed itſelf muſt be given in evidence, and muſt be proved by one witneſs at the leaſt.

But there are ſome exceptions to the general rule of giving the deed itſelf in evidence.

1 M. 94. 1. Where the deed is proved to be in the hands of the oppoſite party, who upon being called upon refuſes to produce it, a copy of it will be good evidence; but ſuch copy ought to be proved by a witneſs who has compared it with the original, for otherwiſe there is no proof of its being a true copy.

1 Keb. 117.

Thompſon v. Jones Mic. 18. Geo. 3. If the oppoſite party produce the deed on notice, it ſhall be read without any proof of the execution.

Rex v. Inhabitants of Middlezoy. Tr. 27 G. 3. 10 Co. 92. Where a will remains in chancery by the order of the court, a copy may be given in evidence, becauſe the original is not in the power of the party. So where it is proved, that the deed itſelf is deſtroyed by fire, a copy of it may be given in evidence; but perhaps in ſuch caſe, if it came out in evidence that there are two parts executed, and the loſs of one only was proved, a copy would not be admitted. So if it were proved, that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought to be read, even though the defendant have ſworn in an anſwer in chancery that he has not got the original.—And in theſe caſes, if the party have no copy he may produce an abſtract, nay even give parol evidence of the contents. And where poſſeſſion has gone along with a deed many years, the original of which is loſt or deſtroyed, an old copy or abſtract may be given in evidence without being proved to be true, becauſe in ſuch caſe it may be impoſſible to give better evidence.

Thurſton v. Delahay. Hereford Aſſ. 1744. Pritchard and Symonds, Hereford 1744. Bartlett and Gawler, Tr. 14 G. 2. K. B.

Stile 205.

As to the ſecond part of the rule; the deed muſt be proved to the jury by one witneſs at leaſt, for though the deed be produced under hand and ſeal, and the hand of the party be proved, yet that is no full proof of the deed; for the delivery is neceſſary to the eſſence of the deed, and there is no proof of a delivery but by a witneſs who ſaw it.

Ca. K. B. 500. But to this part of the rule there are likewiſe exceptions. As where the witneſs to a deed being ſubpœna'd did not appear, but to prove it the party's deed they proved an indorſement, reciting a proviſo within, that if he paid ſuch a ſum the deed ſhould be void, and acknowledging that the ſum was not paid, and by the indorſement he expreſsly owned it to be his deed, and upon this it was read.

So it has been holden, that a deed to lead the uſes of a fine or recovery may be read without proof of its being executed; the reaſon of which ſeems to be, that, by the fine being levied, it appears the parties intended to convey the land to ſome uſe or other, and therefore the law will admit of ſlight proof to ſhew what uſe was intended; ſince the ſlighteſt proof without other to contradict it, will turn the preſumption on that ſide; and therefore though a counterpart of a deed without other circumſtances be not evidence in other caſes, yet it has been holden ſo to be in the caſe of a fine and recovery. However, in a caſe reſerved from *Hereford* aſſizes by Mr. juſtice *William Forteſcue*, all the judges were of opinion that ſuch a deed to lead the uſes of a fine muſt be proved, and therefore it ſeems, as if the caſe in *Salk.* likewiſe were not law.

Glaſcock v. Sir William Warren. H. 12 W. 3.
Salk. 287.
Griffith and Moore.

If the deed be thirty years old it may be given in evidence without any proof of the execution of it: however, there ought to be ſome account given of the deed, where found, &c. And if there be any blemiſh in the deed by razure or interlineation, the deed ought to be proved, though it were above thirty years old, by the witneſſes if living, and if they be dead, by proving the hand of the witneſſes, or at leaſt one of them, and alſo the hand of the party, in order to encounter the preſumption ariſing from the blemiſhes in the deed, and this ought more eſpecially to be done, if the deed import a fraud; as where a man conveys a reverſion to one, and after conveys it to another, and the ſecond purchaſer proves his title; becauſe in ſuch caſe the preſumption ariſing from the antiquity of the deed is deſtroyed by an oppoſite preſumption; for no man ſhall be ſuppoſed guitly of ſo manifeſt a fraud.

Chettle and Pound, H. Aſſize, 1701.

It has been ſaid, that a deed of bargain and ſale inrolled may be given in evidence, without proving the execution of it, becauſe the deed by law does need inrolment, and therefore the inrolment ſhall be evidence of the lawful execution: but that where a deed needs no inrolment, there, though ſuch deed be inrolled, the execution of it muſt be proved; becauſe ſince the officer is not intruſted by the law to inrol ſuch deed, the inrolment will be no evidence of the execution, and the caſes in the margin are cited in ſupport of this doctrine. However, the law may well be doubted, notwithſtanding that deeds of bargain and ſale inrolled have frequently in trials at *niſi prius* been given in evidence without being proved. In

5 Co. 54. Stile 445. 1 Keb. 117. Salk. 280.

ſupport of which practice, the caſe of *Smartle* and *Williams* in *Salk.* is much relied on; but that caſe is wrong reported, for it appears by 3 *Lev.* 387. that the acknowledgement was by the bargainor, and ſo it is ſtated in *Salk.* MS. beſides, it appears from both the books that it was only a term that paſſed, and conſequently it was no inrolment within the ſtatute.

Style 462. If divers perſons ſeal a deed, and one of them acknowledge it, it may be inrolled, and may ever after be given in evidence as a deed inrolled; but it would be of very miſchievous conſequence to ſay therefore that a deed inrolled upon the acknowledgement of a bare truſtee, might be given in evidence againſt the real owner of the land without proving it executed by him. However, that has been the general opinion, and it ſeems fortified in ſome degree by 10 *Ann. c.* 18. before taken notice of.

On the other hand it ſeems as abſurd to ſay that a releaſe, which has been inrolled upon the acknowledgement of the releaſor, ſhould not be admitted in evidence againſt him without being proved to be executed, becauſe ſuch releaſe does not need inrolment; and, in fact, ſuch deeds have often been admitted; and that was the caſe of *Smartle* and *Williams*; the deed did not need inrolment, yet being inrolled on the acknowledgement of the bargainor, it was read againſt him without being proved.

1 Sid. 269. A deed may be given in evidence on a rule of court by conſent, without being proved; for the conſent of parties is concluſive evidence, as the jury are only to try ſuch facts wherein the parties differ.

2 R. 1. 132. Though a deed of feoffment be proved to be duly executed, yet that is not ſufficient to convey a right, unleſs livery of ſeiſin be likewiſe proved. However, where the deed is proved, and poſſeſſion has always gone with the deed, there livery ſhall be preſumed: but if poſſeſſion have not gone along with the deed, the livery muſt be proved; for ſince livery is to give poſſeſſion on the deed, where there is no poſſeſſion, the preſumption is that there was no livery, and conſequently livery muſt be proved to encounter that preſumption. If the jury find a deed of feoffment, and that poſſeſſion has gone along with the deed, yet, unleſs they expreſsly find a livery, the court cannot adjudge it a good conveyance; for they are only judges of what

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is law and have nothing to do with any probability of fact; therefore they cannot conclude that there was a lawful conveyance, unless the jury find a delivery of the fee.

If the issue be *feoffavit vel non*, and a deed of feoffment and livery be proved, it cannot be given in evidence that it was made by covin to defraud creditors; for it is a feoffment *tiel quel*, and the covin ought to have been specially pleaded: *aliter* if the issue be seised or not seised: for he remains seised as to creditors notwithstanding the feoffment. Hob. 72.

This leads me to take notice of the several acts of parliament that have been made to prevent fraudulent conveyances and the determinations thereupon; that it may be seen by what evidence a conveyance may be defeated after the execution of it has been proved.

By 13 *Eliz. cap.* 5. for the avoiding and abolishing of any feigned covenous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, contrived to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs; it is enacted, that all and every feoffment, gift, grant, alienation, bargain, and coveyance of lands and tenements, hereditaments, goods and chattels, by writing or otherwise, and all and every bond, suit, judgment, and execution, had or made for any intent or purpose before declared, shall be taken (only as against them whose action, *&c.* by such covenous practice is disturbed, delayed or defrauded) to be void; any pretence, colour, feigned condition, expressing of use or other matter, or thing to the contrary notwithstanding; provided it shall not extend to any estate, or interest in lands or tenements, goods, or chattels, had, made, conveyed, or assured upon good consideration and *bona fide* to any person not having at the time of such conveyance or assurance, notice of such covin, fraud, or collusion.

It seems setted that no conveyance shall be deemed fraudulent within the statute, unless it can be proved that the person was indebted at the time, or very near, so that they may be connected together, though there have been determinations to the contrary both by Sir *J. Jekyll* and *Fortescue*, M. of *R.* Walter and Burrows in Canc. 1745. Taylor and Jones, 1743

A. being indebted to *B* in 400*l.* and to *C.* in 200*l.* *C.* brings debt, and hanging the writ, *A.* makes a secret conveyance of Twyne's case, 3 Co. 80.

all his goods and chattels to *B.* in satisfaction of his debt, but continues in possession, and sells some, and sets his mark on other sheep; and it was holden to be fraudulent within this act. 1. Because the gift is general, 2. The donor continued in possession, and used them as his own. 3. It was made pending the writ, and it is not within the proviso; for though it is made on a good consideration, yet it is not *bonâ fide.* But yet the donor continuing in possession, is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money.

3 Co. 83. Ca. K. B. 287.

Baker and Lloyd per Holt Ch. J. 1706.

If *A.* make a bill of sale to *B.* a creditor, and afterward to *C.* another creditor, and deliver possession at the time to neither, and afterward *C.* get possession, and *B.* take them from him, *C.* cannot maintain trespass, because though the first and second bill of sale are both fraudulent against creditors, yet they both bind *A.* and *B.*'s is the elder title. S. P. in *Cowell* v. *Lane* and others, *cor. Buller* J. at *Worc.* Spr. 1783, where the action brought by *C.* was trover, and he held it would not lie.

2 Cr. 270.

No person can take advantage of this statute but the creditors themselves, and therefore, where *A.* made a fraudulent gift of his goods to *B.* and then died, *B.* brought an action against *A.*'s administrator for the goods, and the court held he could not plead the statute, or maintain the possession of the goods, even to satisfy creditors; but the creditors may charge the vendee as executor *de son tort.*

Hob. 72.

Judgment against *T. K.* who died, and *scire facias* against the tenants, the sheriff returned *B.* a tertenant, who came in and pleaded, that *T. K.* enfeoffed him long before the judgment, *absque hoc* that he was seised at the time of the judgment, or at any time after, whereupon issue, and the jury find the feoffment, but further add, that it was by covin to defraud the plaintiff and other creditors, and judgment for the plaintiff; for *T. K.* remained still seised as to the creditors notwithstanding the feoffment; but if the issue had been taken directly, enfeoffed or not enfeoffed, it had been found against the plaintiff; for it is a feoffment *tiel quel.*

Hamond and Russel, M. 12 G. 2. in Canc.

A settlement being voluntary is only an evidence of fraud, yet it has always been reckoned sufficient in respect to creditors; but where a father and son join in making a settlement, though after marriage, yet it shall be taken to be a bargain, and therefore

therefore will of itself make a consideration, but that must be where neither could make such settlement alone.

So a settlement after marriage, the portion being paid at the same time, is good against creditors. So it has been holden, that a settlement after marriage, recited to be in consideration of a portion secured, where in fact such portion has been secured, shall be presumed to be in pursuance of an agreement previous to the marriage, though no proof of it, and so will be good against creditors. Pr. in Ch. 426. Ibid. 101.

R. surrenders a copyhold to his son; afterwards on a treaty of marriage for his son, he tells the wife's friends this copyhold was settled, in consideration of which and some leasehold lands the marriage was had, and two thousand pounds paid as a portion; and upon this the surrender was holden not to be voluntary or fraudulent as against creditors. Ibid. 275.

The wife joined with the husband in letting in an incumbrance upon her jointure, and barring the intail, and then the uses were limited to the husband for life, remainder to the wife for life, remainder to the sons in tail, remainder to the daughters in tail who were not in the former settlement; and it was holden that the daughters were not purchasers, so as to shut out a judgment creditor, though the wife's parting with her jointure had been a good consideration to them if it had been so expressed. Pr. in Ch. 113.

A. brought an action against *M.* for lying with his wife; *M.* before judgment made a conveyance of his land in trust for payment of debts mentioned in a schedule. *A.* recovered 5000*l.* and brought a bill to be relieved against the deed as fraudulent, but it was holden not to be so, either in law or equity; for this being a debt founded *in malitia*, it was conscientious to prefer his real creditors before it. Lewkner v. Freeman, Eq. Cases, Abr. 149.

Where the heir made a fraudulent conveyance to defraud his father's creditors, it was holden that the creditor might take advantage of this statute upon the issue *riens per discent.* However since the 3 & 4 *W.* and *M.* *c.* 14. this point cannot come in question. Gooch's case, 5 Co. 60.

The next statute to be taken notice of is 27 *El.* *c.* 4. which enacts that every conveyance, &c. of, in, or out of any lands, &c. had or made for the intent or purpose to defraud and deceive such persons as shall *purchase* in fee, for life or years, the same lands, &c. shall be deemed only as against that person,

and

and thoſe claiming under him, to be void. Provided, it ſhall not extend to impeach any conveyance, for good conſideration, and *bonâ fide*. And if any perſon ſhall make any conveyance with a clauſe of revocation, and after ſuch conveyance ſhall bargain, ſell, convey, or charge the ſame land for money or other good conſideration paid or given, (the firſt conveyance, *&c.* not by him revoked according to the power reſerved) the former conveyance, *&c.* as againſt the ſaid bargainees, vendees, *&c.* ſhall be deemed void; provided that no lawful mortgage made *bona fide*, and without fraud, upon good conſideration, ſhall be impeached by this act.

3 Co. 82. 2 Jones 94.

Upon this ſtatute it hath been holden, that if a man having a future power of revocation ſell the land before the power commences, yet it is within the act. So if the power of revocation be reſerved to be with the conſent of *A.* who is one within his power.

3 Co. 83.

No purchaſer ſhall avoid a precedent conveyance for fraud or covin, but he who is a purchaſer for money or other valuable conſideration.

White and Sampſon in Canc. 1746.

Tenant in tail articled to ſettle his land in ſtrict ſettlement; his wife dying, and he having only daughters levied a fine, and declared the uſes to himſelf for life, with power to make a jointure, remainder to his firſt and other ſons in tail; afterwards he married and executed the power as to the jointure; but ſhewing the deed made no ſettlement on the iſſue, had a ſon, and died; the daughters brought a bill to have the articles carried into execution, and it was ſo decreed; for the ſon cannot be conſidered as a purchaſer, there being no particular contract to make him ſo.

Whatever conveyance is fraudulent againſt creditors, by 13 *Eliz.* will be ſo againſt ſubſequent purchaſers; for the 27 *Eliz.* has always received the moſt liberal conſtruction.

5 Co. 6.

The ſubſequent purchaſer having notice of ſuch conveyance is of no conſequence, for the ſtatute expreſsly avoids ſuch conveyance.

1 Sid. 134. 3 Lev. 387.

A deed, though it be fraudulent in its creation, yet by matter *ex poſt facto* may become good; as if one make a fraudulent feoffment, and the feoffee make a feoffment to another for valuable conſideration, and afterward the feoffor for valuable conſideration make a ſecond feoffment.

If

If the brother have in his hands any of his sister's money, and refuse to pay it to her husband, unless he will make a settlement upon her, such settlement will not be fraudulent. Brown and Jones, M. 1744.

A mother, on her eldest son's marriage, gave up an annuity issuing out of the whole estate for an annuity of the like amount issuing out of part of the estate only; but which was clearly sufficient to pay the annuity; this is a sufficient consideration to prevent the limitations in the eldest son's marriage settlement to his brothers, in default of issue of himself, being fraudulent against a subsequent purchaser. Hamerton v. Mitton, C. B. Mich. 8 G. 3.

If the father make a fraudulent lease of his land, in order to deceive the purchaser, and die before he makes any conveyance, and afterwards his son convey to *J. S.* for valuable consideration, *J. S.* shall avoid the lease. 6 Co. 72. b.

Upon not guilty in trespass the defendant gave in evidence articles by which Sir *Robert Hatton* (under whom the plaintiff claimed as heir) sold to him three hundred of the best trees in such a wood, to be taken between such a time and such a time, and that he within the time took the trees; upon which the plaintiff proved that Sir *Robert* was only tenant in tail; but this being a voluntary settlement of Sir *Robert's* own, *Jones* chief justice held clearly that this sale, being proved to be for a valuable consideration, bound the heir as a case within this act; besides the settlement was with a power of revocation, and the plaintiff was nonsuited. Hatton and Neale in Surry, 1683.

The next statute is 3 & 4 *W. & M. c.* 14. and that enacts, that all wills, dispositions and appointments of any lands, *&c.* shall be deemed, as against any creditor of the devisor, to be fraudulent and of none effect: with a proviso that any devise or disposition for the raising or payment of any just debt or any portion for any child, other than the heir at law, in pursuance of any marriage contract, or agreement in writing *bona fide* made before marriage, shall be in full force.

A tenant for life, remainder to his first and other sons in tail, remainder to his own right heirs for ever, entered into a bond and died, his son entered, devised away the estate, and died without issue. This devise of the reversion was holden to be within this act, for the heir is debtor being bound in the bond. Kynaston and Clarke in Canc. 1741.

If land be devised to the heir for payment of debts, he ought not to plead *riens per discent*, for notwithstanding the devise he is in by descent. Str. 1270.

By

By 1 *Jac. c.* 15. *ſ.* 5. it is enacted, that if any perſon, who ſhall afterwards become a bankrupt, ſhall convey or cauſe to be conveyed to any of his children, or other perſon, any lands or chattels, or transfer his debts into other mens' names, except upon marriage of any of his children, (both the parties married being of the years of conſent), or ſome valuable conſideration, the commiſſioners may convey or diſpoſe thereof the ſame as if the bankrupt had been actually ſeiſed or poſſeſſed, and ſuch ſale or diſpoſition of the commiſſioners ſhall be good againſt the bankrupt, and ſuch children and perſons, and all other claiming under them.

The 21 *Jac.* 1. *c.* 19. *ſ.* 11. recites, that many perſons before they become bankrupts convey their goods upon good conſideration, yet ſtill keep the ſame, and are reputed owners thereof, and diſpoſe of the ſame as their own; and therefore enacts, that if any perſon ſhall become bankrupt, and at ſuch time ſhall, by the conſent and permiſſion of the true owner, have in their poſſeſſion, order and diſpoſition, any goods or chattels, whereof they ſhall be reputed owners, the commiſſioners may diſpoſe of them for the benefit of the creditors.

Ryal and Rowles, H. 23 G. 2. in Canc.

Upon this clauſe it has been holden, that poſſeſſion of lands being no proof of title as poſſeſſion of goods is, a mortgagor continuing in poſſeſſion is not within this clauſe if he deliver up the title deeds: but a mortgage of goods, where poſſeſſion does not go along with the ſale, is within it, unleſs it be a choſe in action, and there, as poſſeſſion cannot be delivered, delivery of the muniments and means of reducing it into poſſeſſion is ſufficient: for the delivery of the muniments is in law a delivery of the thing itſelf; as a delivery of the key of a warehouſe is a delivery of the goods in it; but things fixed to the freehold, till ſeparated, are part of the freehold, and therefore of them a mortgage will be good without a delivery.

Note; there may be a delivery from one parcener to another, or of things in parcenary to a third perſon.

Hartop and Hoare. 3 P. W. 318.

Goods left in the bankrupt's poſſeſſion for ſafe cuſtody only ſeem not to be within this clauſe. — So goods left with the bankrupt to ſell: for one who deals by commiſſion, can gain no credit by his viſible ſtock.

By the ſtatute of frauds, all deviſes of land muſt be in writing, and ſigned by the party deviſing the ſame, or by ſome other perſon

perſon in his preſence, or by his expreſs directions, and atteſt-ed and ſubſcribed in the preſence of the deviſor by three or more credible witneſſes.

If a will be atteſted by two witneſſes, and afterwards the teſtator make a codicil, which he declares to be part of his will, and that is likewiſe atteſted by two witneſſes, yet it will not be a good will within the ſtatute. But if a man publiſh his will in the preſence of two witneſſes, who ſign it in his pre-ſence, and a month after he ſend for a third witneſs, and pub-liſh it in his preſence, this will be good. Carth. 35. Jones and Lake. H. 16 G. 2. 2 Ch. Ca. 109. S. P.

Lord Chief Juſtice *Holt* appears to have been once of opinion, that it was neceſſary that the teſtator ſhould ſign the will in the preſence of the witneſſes; but it ſeems to have been ſince ſettled to be ſufficient for him to own it before them to be his hand. Show. 69. 2 Williams 500. 3 Williams 254.

The ſtatute requires three witneſſes to one ſingle act of exe-cution, and not three ſeveral executions before a ſingle witneſs to each only. Therefore if a man acknowledge his ſeal and hand-writing before three ſeveral witneſſes, this will be a good execution within the ſtatute, becauſe the acknowledgement to all amounts to but one execution: but if he actually ſign and ſeal the will every time before each witneſs ſeparately, ſo as to make each a diſtinct execution, that will not be good. Ellis v. Smith in Canc. 15 May. 27 G. 2. cor. Lord Chancellor, Maſter of the Rolls and two Chief Juſtices.

The ſtatute requires atteſting in the teſtator's preſence, to prevent obtruding another will in the place of the true one. But it is enough if the teſtator might ſee, it is not neceſſary he ſhould actually ſee them ſign; therefore where the teſtator had deſired the witneſſes to go into another room ſeven yards diſtance to atteſt it, in which there was a window broken, through which the teſtator might ſee them, it was holden good. So if the teſtator being ſick ſhould be in bed, and the curtain drawn. Salk. 688.

Note; ſigning need not be by ſetting the name to the bot-tom, it is enough if the will be of the teſtator's hand-writing and begin with I *J. S. &c.* and it has been ſaid, that ſealing is ſigning, and was ſo determined in the caſe of *Wang-ford* and *Wangford* by Lord *Raymond* at *Guildhall*. But this may well be doubted, becauſe the meaning of the ſtatute in re-quiring it to be ſigned by the teſtator was for a further ſecurity againſt impoſition, which can be only by his putting his name or mark; and of this opinion was the court of exchequer in a late Lemain and Stanley, 3 Lev. Webb and Grenville, H. 12 G. 2. Str. 764.

late cause, grounding themselves upon the opinion of Mr. *J.* *Levinz*, in *Lemain* and *Stanley*, and in the case there cited by him out of 1 *R. A.* 245. 25. And if a man make a will on three pieces of paper, and there be witnesses to the last paper, and none of them ever saw the first, this is not a good will.

Lee and Libb.

Bond v. Sewell, B. R. Mic. 6 G. 3.

However where a will consisted of two sheets, and the connection went on regularly from one sheet to the other, and in the first sheet the testator gave lands to trustees after mentioned upon trusts there specified, and in the last sheet appointed persons to be trustees; though the testator never executed the first sheet, and the witnesses never saw it; it was holden by all the judges of *England*, that if the first sheet were in the room at the time of the execution of the second, that was sufficient: for it is not necessary that the witnesses should see or know how many sheets the will consisted of, or whether it is a will or not: and it is clear that a will, properly attested, may by reference bring in another instrument as part of it.

1 Vez. 487.

Str. 1109.

Though the statute require the attestation of the witnesses to be in the presence of the testator, yet it need not appear upon the face of the will to have been so done, but it is matter of evidence to be left to a jury.

Per Lee, Ch. J. in Ansty and Dowsing.

Though the common way is to call but one witness to prove the will, yet that is only where there is no objection made by the heir; for he is intitled to have them all examined, but then he must produce them, for the devisee need produce only one, if that one prove all the requisites; and though they should all swear that the will was not duly executed, yet the devisee would be permitted to go into circumstances to prove the due execution; as was the case of *Austin* and *Willes*, cited by Lord *Hardwicke* chancellor, in *Blacket* and *Widdrington*, *M.* 11 *G.* 2. in which, notwithstanding the three witnesses all swore to its not being duly executed, the devisee obtained a verdict. In *Pike* and *Bradbury* before Lord *Raymond*, upon an issue of *devisavit vel non*, the witnesses denying their hands, the devisee would have avoided calling them, but his lordship obliged him to call them, whereupon, the first and second denying their hands, it was objected he should go no farther; for it was argued, that though, if you call one witness, who proves against you, you may call another, yet if he prove against you too, you can go no farther; but the chief justice admitted him to call other witnesses to prove the will, and he obtained a verdict.

S. C. cited in Str. 1096.

Str. 1026.

Where

Where the atteſtation was only "ſigned, ſealed, publiſhed "and declared in the preſence of us," the witneſſes being dead, and their hands proved, the court held it to be evidence to be left to a jury of a compliance with all circumſtances. Croft v. Pawlet, E. 12 G. 2.

It was laid down by *Lee*, Ch. Juſt. in delivering the opinion of the court of *K. B.* in the caſe of *Anſty* and *Dowſing*, that a deviſee of any part of the eſtate, or a legatee, where the legacy is charged upon the land, will not be a good witneſs, nor would a releaſe make him ſo, as that would not alter his credibility at the time of atteſting. However it has been ſaid, that the judgment of the court was in that caſe founded upon the particular circumſtances of the caſe, and not on any general doctrine, as there was not, nor could be any payment or tender made of the annuity given by the will in that caſe to the witneſs's wife; and the general doctrine laid down by Lord Chief Juſtice *Lee* has been ſince denied by the court of *K. B.* in the caſe of *Wyndham* and *Chetwynd*, *Mic.* 31 *G.* 2. Wyndham and Chetwynd, M. 31 G. 2.

To prevent however the inconveniences which would have ariſen from the above opinion given in *Anſty* and *Dowſing*, in caſe it had been followed, as there are few wills in which the witneſſes have not had legacies or debts charged upon land, the 25 *G.* 2. enacts, 1. That any beneficial deviſe, legacy, eſtate, intereſt, gift or appointment, made to any perſon being a witneſs, after 24th of *June* 1752, to any will or codicil, ſhall be void, and ſuch perſon be admitted as a witneſs.

2. That any creditor atteſting any will or codicil, made or to be made, by which his debt is charged upon land, ſhall be admitted as a witneſs to the execution of ſuch will or codicil, notwithſtanding ſuch charge.

3. That any perſon who had atteſted any will or codicil then made, to whom any legacy or bequeſt was given, having been paid or releaſed, or upon tender made having refuſed to accept ſuch legacy or bequeſt, ſhall be admitted as a witneſs to the execution of ſuch will or codicil.

4. That any legatee, having atteſted a will or codicil then made, who ſhall have died in the life-time of the teſtator, or before he ſhall have received or releaſed his legacy, ſhall be deemed a legal witneſs to ſuch will or codicil.

After which there is a proviſo, that the credit of every ſuch witneſs in any of the caſes before mentioned, ſhall be ſubject to the conſideration of the court and jury before whom he ſhall be examined, or of the court of equity in which his teſtimony

ſhall be made uſe of, in like manner as the credit of witneſſes in all other caſes ought to be conſidered of and determined.

Branſby and Kerridge, 28 July 1718, in Dom. Proc.

Though the deviſee had proved the will duly executed according to the ſtatute; yet if the heir at law can prove any fraud in obtaining it, the jury ought to find againſt the will; for fraud is in this caſe examinable at law, and not in equity.

By the ſtatute of frauds, a will executed as before mentioned, ſhall continue in force until the ſame be burnt, cancelled, torn, or obliterated by the teſtator, or in his preſence, and by his directions and conſent, or unleſs the ſame be altered by ſome other will or codicil in writing, or other writing of the deviſor, ſigned in the preſence of three or more witneſſes declaring the ſame.

Onyons and Tyrer. 1 P. W. 345.

If a man deviſe his land to *A.* and then make a ſecond will, and deviſe it to *B.* and upon that cancel the firſt will by tearing off the ſeal; if the ſecond will be not good as a will to paſs the land to *B.* (the witneſſes not having ſigned it in his preſence) it will be no revocation; neither will the tearing off the ſeal, becauſe no ſelf-ſubſiſting independent act, but done from an opinion that the ſecond revoked it.

Glazier (ex dem.) v. Glazier, B. R. Hil. 10 G. 3.

A. deviſed to *B.* and afterwards made another will, and thereby deviſed to *C.* and expreſly revoked all former wills. At the teſtator's death, both wills were found amongſt his papers; the firſt uncancelled, but the ſeal and name torn off from the laſt. The firſt is a good will: for one will cannot be a revocation of another, till it becomes a perfect will, which is not till the teſtator's death, and at that time the laſt will did not exiſt.

Ld. Lincoln's Caſe, Sh. Par. Caſes. Martin and Savage, 1740.

And note; there are many other ways of revoking a will than what are mentioned in the ſtatute; as by levying a fine of the land deviſed: ſo if the deviſor marry and make a ſettlement on the iſſue, reſerving the fee in himſelf, though he afterward die without iſſue, *&c.*

Selwin and Selwin, Tr. 32 G. 2. K. B.

But where tenant in tail by bargain and ſale conveyed to *J. S.* in fee in order to make him tenant to the *præcipe* in a common recovery, the uſe of which was declared to him in fee, and 8th *June* (*Trinity* term beginning the 7th) made his will, and afterward a writ of entry was ſued out returnable in *Quind Tr.* (17th *June*) and the recovery ſuffered: it was holden that the land paſſed by the will; and the reaſon ſeems to have been that the deed and recovery make only one conveyance, of which the deed is the moſt ſubſtantial part, and therefore to it every ſubſequent part muſt refer.

Darley v. Darley, C. B. Trin. 7 G. 3.

But a leaſe and releaſe and recovery ſuffered after the will, is a revocation.

We

We must next consider where razures and interlineations, and where breaking off the seal avoids a deed. 10 Co. 92.

Formerly, if there were any razure or interlineation, the judges determined upon the profert or view of the deed, whether the deed were good or not: But when conveyances grew so voluminous, such vast room was left for the misprision of the clerk, that the courts thought it necessary not to discharge a deed razed or interlined as void, upon demurrer, but referred it to the jury, whether the deed thus razed or interlined were the individual contract delivered by the party.

If a deed be altered by a stranger in a point not material, this does not avoid the deed, but otherwise, if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party where there is any material difference, but an immaterial alteration does not change the deed, and consequently the witnesses may attest it without danger of perjury. But if the deed be altered by the party himself, though in a point not material, yet it avoids the deed; for the law takes every man's own act most strongly against himself. 11 Co. 27.

If there be several covenants in a deed, and one of them be altered, this destroys the whole deed; for the deed cannot be the same, unless every covenant of which it consists be the same also. 11 Co. 28. b.

If there be blanks left in an obligation in places material, and filled up afterwards by assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered.—As if a bond were made to *C.* with a blank left for his Christian name, and for his addition, which is afterwards filled up.—But if *A.* with a blank left after his name, be bound to *B.* and after *C.* is added as a joint obligor, yet this does not avoid the bond; for it does not alter the contract of *A.* who was bound to pay the whole money before any such addition. 2 R. Ab. 29. 1 Vent. 185.

It has been said that where a thing lies in livery, a deed formerly sealed may be given in evidence, though the seal be afterward broken off, for the interest passed by the act of livery: So, they say, if the conveyance were made by lease and release, and the uses were once executed by the statute, they do not return back again by cancelling the deed: But it is said, if a man shew a title to a thing lying in grant, there he fails if the seal be torn off, for a man cannot shew a title to the thing lying in solemn agreement but by solemn agreement, and there can be no solemn Palm. 403. 405. 8 Mod. 278. Mod. 11. 3 Bulf. 79.

T agree-

agreement without ſeal. However, it may well be doubted, whether this diſtinction will hold. In *Palm.* 403. it was holden, that a deed leading the uſes of a recovery was good evidence of ſuch uſes, though the ſeals were torn off, it being proved to have been ſo done by a young boy: And I take it that in any caſe a deed ſo proved would be evidence to be left to a jury. But perhaps there may be a difference where the iſſue is directly on the deed, and where the deed is only given in evidence to prove another iſſue. On *non eſt factum*, producing a deed without ſeal would not prove the iſſue, however they might account for the ſeal being torn off: But on not guilty in ejectment, a deed might be given in evidence without ſeal, and in caſe they proved the ſeal torn off by accident, the jury ought to find for the party.

5 Co. 23.
3 Bulſ. 79.

If an obligation were ſealed when pleaded, and after iſſue joined the ſeal were torn off, yet the plaintiff ſhall recover his debt, becauſe the deed when proffered to the court was in the cuſtody of the law, and therefore the law ought to defend it; beſides the truth of the plea which is to be proved muſt have relation to the time when the iſſue was taken.— If the ſeal of a deed be broken off in court, it ſhall be there inrolled for the benefit of the parties.

Cr. El. 110.
Owen 8.
Dy. 57.
2 Inſt. 676.

If there be a joint contract or obligation, and the ſeals of one of the obligors be torn off, it deſtroys the obligation; but if they be ſeverally bound, the obligation continues as to the other whoſe ſeal was not torn off, becauſe they are ſeveral contracts. But if two men be jointly and ſeverally bound, and the ſeal of one of them be torn off, this is a diſcharge of the other, for the manner of the obligation is deſtroyed by the act of the obligee; and therefore that is, according to the rule of law, which conſtrues every man's own act moſt ſtrongly againſt himſelf, a diſcharge of the obligation itſelf.

5 Co. 23.
11 Co. 28. b.
2 Lev. 220.
2 Show. 28, 29.
March. 125.

There is now by act of parliament a further requiſite to a deed than heretofore, and that is the ſtamps. One by the 5 *W.* & *M.* *c.* 21. which commenced 28 *June* 1694; a ſecond by an act commencing 1 *Auguſt* 1698; a third by 12 *An. ſt.* 2. *c.* 9. commencing 2 *Auguſt* 1714; a fourth by 30 *G.* 2. commencing 5 *July* 1757; and two others by 23 *G.* 3. *c.* 49. and *c.* 58. which extend to bills, notes, receipts, agreements, &*c.* &*c.* and theſe ſtamps have been frequently the means of detecting forgeries; for the ſtamp-office have ſecret marks on the ſtamps, which from time to time are varied; ſo that where a deed is forged of a date antecedent, it may eaſily be diſcovered by ſtamps being upon it not in uſe at the time it bears date.

A written agreement in theſe words, "A. *doth lett and ſell* "*to B.* for the term of three years," *&c.* was offered in evidence in an action of aſſumpſit on a ſpecial agreement. The defendant objected to its being read, becauſe it was a leaſe and was not ſtamped. For the plaintiff it was ſaid this was only a memorandum of a parol leaſe, which being for three years only is good as ſuch, and that the ſtatute in uſing the words "indenture leaſe or deed poll" meant only deeds. But it was holden that though a parol leaſe for three years is good, yet if a man through caution will reduce it into writing, he muſt pay for the ſtamp, otherwiſe the court are inhibited from receiving it in evidence. Proſſer v. Philips, Hereford ſummer aſſ. 1765. cor. Perrott.

To come now to other private written evidence that is not under hand and ſeal.

And firſt of notes; they are either ſuch as paſs according to the cuſtom of merchants, or that paſs between party and party.

Merchants' notes are in nature of letters of credit paſſing between one correſpondent and another in this form, "Pray "pay to *J. S.* or order, ſuch a ſum, Witneſs my hand, "*J. N.*" Now if the correſpondent accept the note he becomes chargeable in a ſpecial action on the cuſtom.

In this cuſtom there are four things conſiderable; firſt, the bill; ſecondly, the acceptance; thirdly, the proteſt; fourthly, the indorſement.

The bill is in nature of a letter, deſiring the correſpondent to pay ſo much money either at ſight, or, as they term it, at ſingle, double, or treble uſance, which is commonly at one, two, or three months, to be computed from the date of the bill; but as ſuch uſances vary, it is neceſſary for the plaintiff in his declaration to ſhew what they are, elſe he cannot have judgment. Salk. 131.

A foreign bill of exchange was drawn, payable at 120 days after ſight, but when the bill was preſented for acceptance, that was refuſed; upon which an action was immediately brought againſt the drawer, without waiting till the expiration of the 120 days. On the trial the defendant objected that he was not liable till the expiration of the 120 days, and offered to call evidence to prove that the cuſtom of merchants was ſuch. But lord *Mansfield* ſaid the law was clearly otherwiſe, and refuſed to hear the evidence: So the plaintiff recovered. Bright v. Purrier, London, ſittings after Tr. 1765. Bliſſart v. Hirſt, Mic. 11 G. 3.

Though regularly there ought to be three perſons concerned in a bill of exchange, yet there may be only two; as if *A.* draw in this manner, "Pray, pay to me or my order, value received by myſelf." 6 Mod. 29.

 The

The acceptance is giving credit to the bill so far as to make the acceptor liable, and to trust for a repayment to his correspondent.

Salk. 126.

In the case of two joint traders, the acceptance of the one will bind the other; but if ten merchants employ one factor, and he draw a bill upon them all, and one accept it, this shall only bind him and not the rest.

A small matter amounts to an acceptance, as saying "Leave "the bill with me, and I will accept it," for it is giving credit to the bill, and hindering the protest; but if the merchant say, "Leave the bill with me, and I will look over my ac- "counts between the drawer and me, and call to-morrow, "and accordingly the bill shall be accepted." This is no acceptance, because it depends upon the balance of accounts.

Moor v. Whithy, Tr. 10 G. 3. B. R.

A bill was drawn as follows, "To Mr. *R. Whithy*; Sir, "please to pay Mr. *Scot or* order 30 *l. Tho. Newton.*" *Scot* indorsed it to the plaintiff, who presented the bill to the drawee for acceptance, and the defendant (the drawee) underwrites thus.—"Mr. *Jackson*, please to pay this note, and charge it "to Mr. *Newton*'s account. *R. Whithy.*" It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor. It was only a direction to *Jackson*, to pay 30 *l.* out of a particular fund; and if there were no such fund, the money was not to be paid. But *per curiam*, the underwriting is a direction to *Jackson* to pay the sum; and it signifies not to what account it is to be placed when paid: That is a transaction between them two only; and this is clearly a sufficient acceptance.

Smith and Sear. E. 14 G. 3. Comb. 452. Str. 1152. Str. 648.

An acceptance may be qualified, as to pay half in money and half in bills. So to pay when goods sent by the drawer are sold: But he to whom the bill is due may refuse such acceptance, and protest the bill, so as to charge the drawer. The proof of the acceptance is a sufficient acknowledgement on the part of the acceptor, who must be supposed to know the hand of his correspondent; therefore in an action against the acceptor, the plaintiff shall not be put to prove the hand of the drawer; however, proof of the acceptance will not be conclusive evidence against the acceptor, if he can prove the contrary.

The protest is made before a notary public in case of non-acceptance or non-payment, to whose protestation all foreign courts give credit; and the protest is evidence that the bill is not paid; but in *England* they must shew the bill itself as well as the protest, because the whole declaration must be proved.

When

When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to give security to answer the same beyond sea, within double the time the first bill run for.

In case of foreign bills of exchange the custom is, that three days are allowed for payment, and if not paid on the last day, the party ought to protest the bill and return it, and if he do not, the drawer will not be chargeable; but if the last of the three days be a *Sunday*, or great holiday, he ought to demand the money on the second day, and if not paid, protest it on the same day, otherwise it will be at his own peril. 1 Raym. 743.

If the indorsee accept any part of the money from the acceptor, he cannot afterwards resort to the drawer for the remainder of the money, unless he give timely notice to the drawer that the bill is not duly paid: For where a man takes a part of the money only, and does not apprize the drawer that the whole is not paid, he gives a new credit for the remainder. But where timely notice is given that the bill is not duly paid, the receiving part of the money from an acceptor or indorser, will not discharge the drawer or other indorsers: for it is for their advantage that as much should be received from others as may be. Johnson v. Kenyon, C. B. Hil. 5 G. 3.

If a bill be left with a merchant to accept, he to whom it is payable, in case it be lost, is to request the merchant to give him a note for the payment according to the time limited in the bill; otherwise there must be two protests, one for non-payment, the other for non-acceptance.

A. draws a bill on *B.* and *B.* living in the country, *C.* his friend accepts it, the bill must not be protested for non-acceptance of *B.* and then *C.*'s acceptance shall bind him to answer the money.

If the drawee indorse the bill over to another, the receiver has not only the original credit of the drawer at stake, and that of the acceptor of the bill, if accepted, but also of the indorsor, and he may have an action against either; but a bill of exchange cannot be assigned over for a payment in part, so as to subject the party to several actions. Carth. 466.

A. drew a bill of exchange in the *West-Indies*, on *T.* in *London*, at sixty days sight, to *W.* or order; *W.* indorsed to *G.* who presented the bill to *T.* who refusing, *G.* noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote a letter to *A.* and also to his agent in the *West-Indies*, acquainting them that the bill was not accepted. In an action Goostrey and Mead. West. 1751.

brought against A. by G. on this case he was nonsuited, for by not sending the protest for non-acceptance, he made himself liable. The use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated of the day the noting was made.

It was doubtful whether inland bills of exchange were within this custom of merchants, but by 9 & 10 *W.* 3. *c.* 17. and 3 & 4 *An. c.* 9. they are put upon the same foot with foreign bills; and though they require the acceptance to be in writing, in order to charge the drawer with damages and costs, yet there is a proviso that it shall not extend to discharge any remedy against the acceptor, so that an action will still lie on a parol acceptance.

Str. 1000.

By the 3 & 4 *An. c.* 9. All notes in writing, that shall be made and signed by any person, whereby such person promises to pay to another or his order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to such person to whom the same is made payable; and every note made payable to any person or his order, shall be assignable or indorsable over, and the person to whom such sum of money is by such note made payable, may maintain an action for the same; and any person to whom such note is indorsed may maintain his action for the same, either against the person who signed such note, or against him that indorsed it; and in every such action the plaintiff shall recover his damages and costs.

1 Str. 629. 2 Raym. 1396.

There are no prescribed forms of these promissory notes, and therefore whatever imports an absolute promise to pay will be sufficient; as a promise to be accountable to *J. S.* or order. But a promise to pay on an incertain contingency, depending perhaps on the will of the drawer, is not within the act, because it will not answer the intent; nor within the words which import an absolute promise to pay; and therefore a promise to pay upon his marriage is not good; but a promise to pay on a return of a ship has been holden good, because it respects trade. So a promise to pay, or do another act, has been holden not to be within the act; as a promise to pay, or deliver the body of *J. S.* So a promise to pay, if his brother did not, is not within the act, for the same reason of incertainty. So a promise to pay money and do some other thing, *ex. gr.* deliver a horse, is not within the statute. So a promise to pay three hundred pounds to *B.* or order,

Baldwin's Case, E. 14 G. 2. Str. 1151.

Andrews v. Franklin, 1 Str. 24. 2 Raym. 1396. Appleby v. Biddulph. H. 3 G. 1. 2 Str. 1271. Moor and Vanlute, E. 1 G. 1. C. B.

order, in three good *East-India Bonds*, is not a note within the statute. But a promise to pay on the death of another, as that is a contingency which must happen, will be good. Coke and Coleham. Mic. 18 G. 2. Goss v. Nelson Burr. 226.

A note payable to an infant, when he should come of age, *viz. June* 12, 1750, was holden to be within statute.

A bill payable to a man's order is payable to himself, and he may bring an action, averring he made no order. 1 Salk. 130.

A note payable to a feme sole or order, who marries, can only be indorsed by the husband. Str. 516.

So likewise such note may be indorsed by an executor or administrator. Str. 1260.

In an action by the indorsee against the drawer, upon *non assumpsit* the plaintiff proved the drawer's hand, and that when the note with the indorsement was shewn to the indorsor, he acknowledged it was his hand-writing, but this was holden not sufficient to charge a third person. Hemming and Robinson, M. 6 G. 2.

There is a distinction between a note payable to *B.* or order, and to *B.* or bearer; in the first case, in an action against the indorsor the plaintiff must prove a demand on the drawer, but not in the last, for there the indorsor is in nature of an original drawer. In the first case, if the indorsee give credit to the drawer, without notice to the indorsor, it will discharge him: So receiving part of the money from the drawer will for ever discharge the indorsor; for by such receipt the indorsee has made his election to have his money from the drawer. Wilmore and Young, per Eyre, G. Hall. M. 1 G. 2. Kellock and Robinson, H. 13 G. 1. Str. 745.

A cash note on a banker, payable to *the ship, Fortune, or bearer*, is a good and negotiable bill of exchange, and the bearer may maintain an action on it in his own name: Or he may recover on it in an action for money had and received to his use. But in either case he must prove that he got the bill fairly, and *bona fide*. Grant v. Vaughan, B. R. Tr. 4 G. 3. Burr. 1516.

If the indorsor have paid part of the money, that will dispense with the necessity of proving a demand on the drawer. Str. 1246.

In an action against the indorsor the plaintiff need not prove the drawer's hand, for if it be a forged bill, yet the indorsor is liable. Salk. 127.

The indorsee must give a reasonable notice to the indorsor in convenient time, upon default of payment by the drawer; but proof of making enquiry after defendant, who could not be found, will be sufficient to excuse the giving such notice, unless the defendant can prove he was to be found. Truby and Delafountain M. 2 G. 2. per Raym. at Guild Hall. 2 Str. 1087. S. P.

Dexlaux and Hood, 7 Feb. 1752, at G. Hall, tamen quære, in Brown v. HarradEN, K. B. Hil. 31 G. 3. it was adjudged that there were three days of grace on a promiſſory Note.

In an action againſt the indorſor of a note of hand, where the note was due the fifth, and there was no demand on the drawer till the eigth, and no notice to the indorſor till the nineteenth: Mr. Juſtice *Deniſon* thought the plaintiff had not made uſe of due diligence either in demanding the money, or in giving notice to the indorſor, and ſaid there were no days of grace on a note as there are on a bill of exchange; but the jury ſaid it was commonly underſtood that there were three days of grace, and therefore thought the demand was made in time; but the judge ſaid the law was otherwiſe, and directed them to find for the defendant.

Collet and Griffith, H. 2. G. 2. G. Hall.

In an action againſt the indorſor, lord *Raymond* would not allow the defendant to give in evidence, that the plaintiff deſired him to indorſe the note to enable him to bring an action againſt the drawer, but declared he would not ſue the defendant. But where the action was brought by the drawee againſt the drawer, the defendant was let in to ſhew it was delivered as an eſcrow, *viz.* as a reward in caſe he procured the defendant to be reſtored to an office, which it being proved he did not effect, there was a verdict for the defendant.

Str. 674.

Snelling and Briggs, at Reading, 1741.

And it ſeems a reaſonable diſtinction which has been taken between an action between the parties themſelves, in which caſe evidence may be given to impeach the promiſe and an action by or againſt a third perſon, *viz.* an indorſee or an acceptor.

Str. 1155.

Where the defendant borrowed money of *J. S.* who lent it knowingly to game with, and aſſigned the note for a valuable conſideration to the plaintiff, who had no notice, yet it was holden void by 9 *Ann.* c. 14.

Robinſon and Bland, Tr. 34 G. 2.

Sir *John Bland* gave a bill of exchange to *Robinſon* for 672 *l.* *viz.* 300 *l.* lent at the time and place of play, and 372 *l.* loſt. The play was very fair, and there was not any imputation on *Robinſon*'s behaviour. He brought an action of *aſſumpſit* againſt Sir *John*'s repreſentative on the bill of exchange, and alſo for money lent. Upon a caſe reſerved, the court held that he ſhould not recover on the firſt count, the bill of exchange being void by 9 *Ann.* But they held as to the ſecond count, though no action could be maintained for money won at gaming, the ſtatute prohibiting any recovery upon a gaming conſideration, yet as to the money lent the ſtatute only avoids the ſecurity, and not the contract, which when fair is good, and therefore gave judgment for

for the plaintiff for 300 *l*.—In the same case it was made a question, whether the plaintiff should recover any, and what interest. As to the first, the Court said, that though the security were void, yet he had agreed to pay interest. As to the second, though the practice had been to stop interest at the bringing of the action, yet they held the plaintiff entitled to interest to the time of the judgment, and said, the Court ought always to give interest to the verdict at least.

Though it be sufficient for the plaintiff in an action on a note of hand to prove the note to have been given by the defendant, yet the defendant will be at liberty to shew it was given on an illegal consideration, and so avoid the lien of it. Guichard v. Roberts, Mic. 4 G. 3. K. B.

Where in the declaration the indorsement was set out to be for value received, but being produced, had it not: Lord Chief Justice *Eyre* allowed the indorsement to be filled up in court, notwithstanding the case of *Clements* and *Jenkins*, *P.* 3 *G.* 2. was cited, where Lord *Raymond* refused to let it be done. E. 6 G. 2.

But a bare indorsement of a name transfers no property, and therefore where the plaintiff produced the note with his own name indorsed, *Lee* Chief Justice, suffered him to strike it out. Str. 1103.

A note payable to *B.* or order, was indorsed thus, "Pray pay the contents to *C.*" In the declaration the indorsement was set out as payable to *C.* or order; at the trial it was objected there was a variance; but the Court held that, as the note was in its original creation indorsable, it would be so in the hands of the indorsee, though not so expressed in the indorsement, and therefore in substance it was agreeable to the count, and therefore no variance. Cited by Mr. Faz. in Rex v. Morris, H. 4 G. 2.

I have already said, that if the indorsee give credit to the drawer, without notice to the indorsor, it will discharge him: it is therefore to be seen what shall be construed a giving of credit; and not demanding the money of the drawer in a reasonable time, is giving credit. What shall be deemed a reasonable time must depend upon the circumstances of the case; and is a question of law arising out of the fact. However it may not be improper to shew what in general has been deemed a reasonable time. Sir J. Hankey v. Trotman, M. 19 G. 2. Metcalf v. Hall, K. B. Tr. 22 G. 3.

In *Mainwaring* and *Harrison* the case was, upon the 17th of *September*, being a *Saturday*, about two in the afternoon, the defendant gave the plaintiff a goldsmith's note, who paid it away the same day to *J. S.* The goldsmith paid all that day and 1 Str. 508.

and all *Monday*. *J. S.* came on *Tuesday*, but then payment was ſtopped; upon which the plaintiff paid back the money to *J. S.* and aſked it of the defendant, who refuſed, upon which the action was brought; the Chief juſtice left it to the jury, who would have found it ſpecially, but he would not let them, ſaying it was a matter proper for their determination; upon which they gave a verdict for the defendant, and held there was laches in *J. S.* ſaying they were all agreed that two days was too long.

Str. 1175. So where *Chitty* had given the *Eaſt India* Company a note on *Caſwell* at eleven in the morning, they did not ſend it for payment till two o'clock the next day; and it was holden that they had made it their own by their laches.

Metcalf v. Hall. K. B. Tr. 22 G. 3. But it has been ſince determined that the next day after a banker's draft is given is the time allowed by law for demanding payment of it.

Salk. 132. In *Hill* and *Lewis*, the defendant indorſed to Z. who the ſame day indorſed to the plaintiff, who afterward the ſame day received money upon other bills of the ſame banker, and might have received the money upon the bill in queſtion, if he had demanded it. The night following the banker broke, and the jury upon conſideration (it being left to them by the Lord Chief Juſtice) found for the plaintiff.

Anſon and Bailey, Mich. 1748, G. H. The defendant having a promiſſory note, payable to him or order two months after date, indorſed it to the plaintiff, who ſent his ſervant to the drawer for the money, who ſaid the defendant had promiſed not to indorſe the note over without acquainting him; that he had not ſo done, and therefore he was not prepared to pay it, but promiſed payment in three or four days; and in like manner put him off from time to time. After three weeks the plaintiff wrote to the defendant (not having ſooner learned his direction, though it was proved he ſooner enquired after it, and was told where he might learn it) that *Smith*'s note was not paid; that he had often promiſed payment, but had alledged, that the defendant promiſed not to make uſe of it without acquainting him firſt: *Smith* became a bankrupt; the plaintiff writes a ſecond letter; the defendant anſwers, that when he comes to town he will ſet that matter to rights; upon this evidence the jury gave a verdict for the plaintiff, notwithſtanding it appeared *Smith* continued ſolvent three weeks, and paid above a hundred pounds in the time.

A bill

A bill was drawn by the defendant upon *H.* for work done by the plaintiff on the defendant's farm, in the possession of *H.*—The plaintiff did not give notice to the defendant, that the bill was not paid till three months after it was drawn: And after a verdict for the plaintiff, the Court granted a new trial; holding this to be such a laches as discharged the defendant. Chamberlayne v. Delaryse, C. B. Tr. 7 G. 3.

The defendant had a note of sixty pounds of one *Bellamy*, a goldsmith, payable to him or bearer at a day then to come, about a week before which he discounted it at the bank without indorsing the bill; *Bellamy*, about two months after, broke without having paid the bill, upon which the bank brought *Assumpsit* for money lent, and upon this evidence obtained a verdict; but the Court granted a new trial, holding it to be a verdict against law; for if the owner of a bill, payable to bearer, deliver it for ready money paid down for the same, and not for money antecedently due, or for money lent on the same bill, this is selling of the bill like selling of tallies, *&c.* But if there be an indorsement thereon, the indorsee may have remedy on that indorsement, provided he demand the money in a convenient time. Bank of England v. Newman, P. 11 W. 3. Salk. MSS. 1 Raym. 442. S. C.

As the intent of the 3 & 4 *An.* was to put promissory notes upon the same footing with inland bills of exchange; all that has been before said in regard to promissory notes is applicable to such inland bills. However the analogy between promissory notes and bills of exchange should be attended to, in order the better to understand the cases. Whilst the promissory note continues in its original shape, there is none: But when the note is indorsed the resemblance begins; for then it is an order to pay the money to the indorsee, and this is the very definition of a bill of exchange: therefore the indorsee, before he brings an action against the indorsor of a promissory note, ought to demand the money of the drawer: but it must be made on the drawee before an action is brought against the indorsor of a bill of exchange; and no inquiry need be made after the drawer. Heylin v. Adamson, Mich. 32 G. 2. K. B.

It may be proper further to take notice, that 9 & 10 *W.* 3. *c.* 17. gives power of protesting any inland bill of exchange of five pounds or upwards, (in which is acknowledged and expressed the value to be received;) but this act has no effect, unless the party on whom the bill was drawn, accept it by under-

writing;

writing; therefore by the 3 & 4 *An.* c. 9. the same power is given in case the party refuse to accept it, with proviso that no protest shall be necessary, unless the bill be drawn for twenty pounds or upward.

Salk. 131. It has been holden upon these statutes, that in declaring upon an inland bill a protest need not be set forth, as it must upon a foreign bill, for the statute does not take away the plaintiff's action for want of a protest, but only deprives him of damages or interest.

6 Mod. 81. But if any damages accrue to the drawer for want of a protest, they shall be borne by him to whom the bill is made, and if, in such case, the damage amount to the value of the bill, there shall be no recovery.

1 Show. 317. It is not necessary to set forth the custom in an action upon a bill of exchange, for *lex mercatoria est lex terræ*; and if he set it forth, and do not bring his case within it, yet if by the law merchant he have right, the setting forth the custom shall be rejected as surplusage.

Salk. 126. Raym. 872. If *A.* write his name on the back of the bill, and send it to *J. S.* to get it accepted, which is done accordingly, *A.* may, notwithstanding, bring an action against the acceptor, for *J. S.* has it in his power to act either as servant or assignee; for he may witness his election by filling up the blank over the name to receive it as indorsee, or by omitting it, act only as servant.

Hil. 18 G. 2. per C. B. Note; In a writ of enquiry before the sheriff, on a judgment by default in an action on a promissory note, the plaintiff must prove his note the same, as if the defendant had pleaded *non assumpsit*; though in debt on bond and judgment by default it is otherwise.—Yet in *Bevis* versus *Lindsell*, *Hill.* 14 *G.* 2. (Str. 1149.) the court of *K. B.* held, that on executing a writ of enquiry on judgment by default in *assumpsit* upon a promissory note, it was not necessary to produce the subscribing witness, for the note being set out in the declaration is admitted, and the only use of producing it is to see whether any money is indorsed to be paid upon it; it must therefore be proved to be his note, which may be by proving his hand.

29 Car. 2. c. 3. By the statute of frauds, several things must be evidenced by writing, of which before that statute parol evidence had been sufficient.

1. All

1. All leases, estates, interest of freehold, or term of years, created by parol, and not put in writing and signed by the parties making the same, or their agents thereunto lawfully authorised by writing, shall have the effect of estates at will only, except leases not exceeding three years from the making, whereupon the rent reserved amounts to two thirds of the improved value, and that no such estate or interest shall be granted or surrendered but by deed or note in writing.

2. All declarations and assignments of trusts shall be proved by some writing signed by the party, or by his last will, except trusts arising, transferred or extinguished by implication of law.

3. It is enacted, that no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorised.—And that no contract for the sale of goods, wares and merchandize, for the price of ten pounds *sterling* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged, or their agents thereunto lawfully authorised.

Upon this clause it has been holden, that the plaintiff need not in his declaration shew any note in writing, but it will be sufficient for him to produce it on the trial; but if such promise be pleaded in bar of another action, it must be shewn to be in writing, so that it may appear to be such a contract on which an action will lie. 1 Raym. 450.

The defendant bespoke a chariot, and when made refused to take it: In an action for the value, *Pratt* Ch. J. held this not to be a case within the statute, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable Str. 516

ſwerable without time given him by ſpecial agreement; and the ſeller is to deliver the goods immediately.

Simon v. Metivier, B. R. Tr. 6 G. 3.

The defendant bought a lot for more than 10 *l.* at an auction, catalogues and conditions of the ſale were printed, and the defendant was the beſt bidder. The auctioneer wrote the defendant's name and the price againſt the lot in the printed catalogue by the order and aſſent of the defendant. Between the day of the ſale, and the time for taking the lot away, the defendant ſent his ſervant to ſee them weighed; which he did. The defendant neglecting to take away the goods, they were re-ſold at a conſiderable loſs; and this action was brought for the difference, and the court ſtrongly inclined that ſales by auction were not within the ſtatute of frauds, becauſe multitudes are generally preſent who can teſtify the terms of the contract. 2. They held the contract was here ſufficiently reduced into writing, and ſigned by an agent of the defendant's; for the auctioneer for that purpoſe was his agent. 3. They held the weighing by his ſervant was a delivery. 4. *Yates* J. held that as the contract was executory, *viz.* the lot to be fetched away in ſix weeks, that therefore it was not within the ſtatute.

Cocke and Baker, Hil. 3 G. 2 C. B. Salk. 280.

Mutual promiſes to marry are not within this act, which relates only to contracts in conſideration of marriage.

So a promiſe to pay upon the return of a ſhip is not within the ſtatute, for the ſhip by poſſibility may return in a year.

Fenton v. Emlyn B. R. Hil. 2 G. 3.

So a promiſe to pay 6 *l.* a year wages, and to leave an annuity of 16 *l. per annum* for life by will is not within this act, for it might by poſſibility be perfected within the year.

Salk. 27.

Where the undertaker only comes in aid to procure credit to the party, there is a remedy againſt both; and both are anſwerable according to their diſtinct engagements. But where the whole credit is given to the undertaker, ſo that the other party is only as his ſervant, and there is no remedy againſt him; this is not a collateral undertaking. Therefore if two come to a ſhop, and one buy; and the other to gain him credit, promiſe the ſeller, "If he do not pay you, I will;" this is a collateral undertaking, and void without writing: But if he ſay, "Let "him have the goods, I will be your paymaſter;" this is an undertaking for himſelf, and he ſhall be intended the very buyer and the other to act as his ſervant. But if *A.* promiſe *B.* that if he will cure *D.* of a wound, he will ſee him paid; it is only a promiſe to pay, if *D.* do not; and therefore ought to be in writing.

2 Raym. 224.

However

However it is impossible to lay down any precise rule for the construction of such sort of words, but it must be left to the jury to determine, upon the whole circumstances of the case, to whom the original credit was given. Salk. 27.

Wherever a person is under a moral obligation to do a thing, and another does it without request from him, a subsequent promise to pay is good, though not in writing: as where a pauper is taken ill, and an apothecary sent for without the knowledge of the overseers of the poor, who attends and cures her, and after the cure the overseers promise payment by parol, this is good; for overseers are under a moral obligation to provide for the poor. Watson v. Turner & al' Exchequer. Tr. 7 G. 3.

An action was brought against the defendant and two others, for appearing for the plaintiff without a warrant, and the defendant promised that in consideration the plaintiff would not prosecute that action, he would pay him 10*l.* and costs of suit. This was holden not within the statute. But *per Holt*, if *A.* say, don't go on against *B.* and I will give you 10*l.* in full satisfaction of the action, this would be within the statute. 5 Mod. 205. Comb. 362. Ibid.

In consideration that the plaintiff would not sue *A. B.* the defendant promised to pay the plaintiff the money due, *viz.* 4*l.* in a week; this was holden to be within the statute of frauds; for no consideration laid that the plaintiff had promised not to sue, and if he had, *A. B.* could in no sort have availed himself of this agreement, but the debt is still subsisting, and consequently the promise collateral. Rothery and Curry, Tr. 21 G. 2. C. B. Comb. 163. Stra. 873.

But where in consideration, that the plaintiff in an action of assault and battery against *J. S.* would withdraw the record and forbear to proceed, the defendant promised to pay him 30*l.* the court held this to be a new consideration sufficient to raise a promise and not within the statute. Read and Nash, Hil. 23 G. 2. K. B.

So if *A.* promise *C.* that in consideration of his doing some particular act, *B.* will pay him such a sum, *A.* is the principal debtor, for the act done is on his credit, and not on *B.*'s. Fitzg. 302.

Many of the doubts upon this statute have arisen by making use of the word *collateral*; which is not a word used in the act of parliament. The proper consideration is, whether it be or not a promise to answer for the debt of another; for if it be, though it be upon a new consideration, and therefore strictly speaking, not a collateral undertaking, yet it is within the statute, and the adding to the promise of the payment of the

Fish v. Hutchinson, Tr. 31 G. 2. C. B. 1 Raym. 182.

the debt a promise to pay the costs of the action would make no difference,

Note; *per Treby*, C. J. a contract for the sale of timber growing upon land is not within the statute, but may be by parol; because it is a bare chattel.

Salk. 280.

Upon that part of the clause which directs, that no action shall be brought on any ageement not to be performed within one year from the making, unless the agreement be in writing; it has been holden, that a promise to pay money on the return of a ship, which happened not to return within two years after the promise made, is not within the statute; for by possibility, the ship might have returned within a year; and though by accident it happens not to return so soon, yet it does not bring the case within this clause of the statute, which extends only to promises, where by the express appointment of the party the thing is not to be performed within a year.

Comb. 463. Skin. 326.

A man contracts to pay 100 *l.* on the day of marriage, this need not be put in writing, for it depends on a contingency, which may, or may not be performed within a year.

Salk. 690.

Before we conclude with written evidence, it is proper to take notice of 7 *Jac. c.* 12. which enacts, that the shop-book of a tradesman shall not be evidence after a year. However it is not evidence of itself within the year, without some circumstances to make it so. As if it be proved that the servant who wrote it is dead, and that it is his hand-writing, and that he was accustomed to make the entries. So where the evidence was, that the usual way of the plaintiff's dealings, was that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book, to which the draymen set their hands, and that the drayman was dead, and this is his hand; it was holden to be good evidence of a delivery. But where the plaintiff to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his hand; Lord Chief Justice *Raymond* would not allow it, saying, it differed from lord *Torrington*'s case, because there the witness saw the drayman sign the book every night.

Salk. 285. Ld. Torrington's Case.

Clerk and Bedford, M. 5 G. 2.

3 May 1738.

Upon an issue out of chancery, to try whether eight parcels of *Hudson's Bay* stock, bought in the name of Mr. *Lake*, were

in trust for Sir *Stephen Evans*, his assignees (the plaintiffs) shewed first that there was no entry in the books of Mr. *Lake* relating to this transaction. Secondly, six of the receipts were in the hands of Sir *Stephen Evans*, and there was a reference on the back of them by *Jeremy Thomas* (Sir *Stephen*'s book-keeper) to the book *B. B.* of Sir *Stephen Evans*. Thirdly, *Jeremy Thomas* was proved to be dead, and upon this the question was, whether the book of Sir *Stephen Evans* referred to, in which was an entry of the payment of the money, should be read. And the court of king's bench at a trial at bar, admitted it not only as to the six, but likewise as to the other two in the hands of Sir *Biby Lake*, the son of Mr. *Lake*. And in *Smartle* and *Williams*, where the question was whether the mortgage money was really paid; a scrivener's book of accounts (the scrivener being dead) was holden to be good evidence of payment. Cited by Ld. Hardw. in Montgomerie and Turner. 1751.

If *J. S.* be seised of the manors of *A.* and *B.* and he cause a survey to be taken of *B.* and afterwards convey it to *J. N.* and after disputes arise between the lords of the two manors concerning the boundaries, this survey may be given in evidence. *Aliter* if the two manors had not been in the same hands at the time of the survey taken. 1 Raym. 734.

To come now to unwritten evidence, or proof *viva voce* as to which every person may be a witness, but such who are excluded for want of integrity or discernment.

In regard to want of integrity, it is a general rule that no person interested in the question can be a witness.

The strict notion of the objection to the competency of a witness is upon a *voyer dire*, whether he be to get or lose by the event of the cause; therefore if the right of common be claimed by custom, and the witness also claims under the same custom, he cannot be received, for the verdict and judgment on a custom though *res inter alios acta*, would be evidence for or against him to prove or disprove the custom. But if the common be claimed by prescription as belonging to the estate of *A. B.* who likewise claimed common as belonging to his estate by prescription may be a witness, for if *A.* has such right of common, it does not follow that *B.* has, nor would the verdict in the action of *A.* be evidence in *B.*'s action. Per Hardw. in Rex v. Bray. H. 10 G. 2. Walton & others v. Shelley. K. B. Tr. 26 G. 3. Bent v. Baker. B. R. Hil. 29 G. 3.

So in an *action on a policy* of insurance, any who have insured upon the same ship may be witnesses. In an action by a master for beating his servant *per quod servitium amisit*, the servant may be a witness, for he is not only not interested in the cause, but not in the question: For there the question is the loss of service, and the action he is entitled to is of a different kind. Jewel v. Harding, Tr. 10 G. 1.

1 Salk. 283.

It muſt be a preſent intereſt, for a future contingent intereſt will not be ſufficient to prevent him from being a witneſs; therefore an heir at law may be a witneſs, but a remainder man cannot.

By 27 *Geo.* 3. *c.* 29. In actions on penal ſtatutes, inhabitants of any place are witneſſes to prove an offence, notwithſtanding the penalty be given to the poor, or otherwiſe for the benefit of the pariſh or place, provided the penalty does not exceed 20 *l.*

1 P. W. 259. Holt v. Tyrrel, P. 13 G. 1. K. B. at Bar.

An intereſt is when there is a certain benefit or advantage to the witneſs attending the determination of the cauſe one way. Therefore a naked truſt does not exclude a man from being a witneſs. And though in ſuch caſes it has been uſual to have a releaſe from a truſtee, yet that is not neceſſary, for ſuch perſon has in fact no intereſt to releaſe. However a truſtee ſhall not be a witneſs to betray the truſt; therefore where the defendant pleaded to debt on bond, the 5 & 6 *Edw.* 6. againſt buying and ſelling offices, and upon the trial *A.* was produced as a witneſs to give an account upon what occaſion the bond was given, Lord Chief Juſtice *Holt* refuſed to admit him, becauſe it appeared he was privately intruſted to make the bargain by both parties, and to keep it ſecret.

Lindſey and Talbot, Tr. 12 G. 1. Oct. Str. 140.

And the caſe is the ſame as to counſel and attornies, who ought not to be permitted to diſcover the ſecrets of their clients, though they offer themſelves for that purpoſe; for it is the privilege of the client and not of the counſel or attorney. It is contrary to the policy of the law to permit any perſon to betray a ſecret with which the law has intruſted him; and it is miſtaking it for the privilege of the witneſs that has ſometimes led judges into the ſuffering of ſuch a witneſs to be examined. But to this there are ſome exceptions: Firſt, as to what ſuch perſons knew before the retainer; for as to ſuch matters they are clearly in the ſame ſituation as any other perſon: Secondly, to a fact of his own knowledge, and of which he might have had knowledge, without being counſel or attorney in the cauſe. As ſuppoſe him witneſs to a deed produced in the cauſe, he ſhall be examined to the true time of execution. So if the queſtion were about a razure in a deed or will, he might be examined to the queſtion, whether he had ever ſeen ſuch deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to diſcover any confeſſions his client may have made to him on ſuch head: So if an attorney were preſent when his client was ſworn to an anſwer in chancery, upon an indictment for perjury he would be a witneſs to prove the fact of taking the oath,

Ld. Say and Seal's caſe, Mic. 10 An. per Sir G. Bridgman, with advice of all the judges.

Str. 1122. E. con.

oath, for it is a fact in his own knowledge, and no matter of secrecy committed to him by his client.

A *scire facias* was brought by the king to avoid a patent, and exception was taken to the witness, because he was deputy to the persons that would avoid it, and the exception was disallowed, because the *scire facias* is in the king's name, and therefore it cannot be presumed that the interest is in another, which would destroy the very being of the *scire facias*, but the proof of that ought to come on the defendant's side to destroy the proceedings. 1 Mod. 21.

It is no good exception to a witness that he has common *per cause de vicinage* of the lands in question, for this is no interest but only an excuse for a trespass.

From this rule it is apparent, that the plaintiff or defendant cannot regularly be a witness in his own cause, for he is most immediately interested; therefore an answer in equity is of very little weight where there are no proofs in the cause, to back it; yet if there be but one witness against a defendant's answer, the court will direct a trial at law to try the credibility of the witness; and in such case will order the defendant's answer to be read to the jury. Eq. Ca. Abr. 229.

But if any person be arbitrarily made a defendant to prevent his testimony, the plaintiff shall not prevail by that artifice; but the defendant against whom nothing is proved shall be sworn notwithstanding, for he does not swear in his own justification, but in justification of another. However this rule is to be understood where there is no manner of evidence against the defendant; for if there be, his guilt or innocence must wait the event of the verdict.

In trespass, if one whom the plaintiff designed to make use of as a witness be by mistake made a defendant, the court will on motion give leave to omit him, and have his name struck out of the record, even after issue joined: for the plaintiff can in no case examine a defendant though nothing be proved against him: And therefore in an information for a misdemeanor, the attorney general (*Trevor*) offering to examine a defendant for the king, which the court would not permit, he entered a *nolle prosequi*, and then examined him. — If a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default; but if he plead, and 1 Sid. 441. Dormer and Fortescue, M. 9 G. 2.

by that mean admit himself to be tenant in possession, the Court will not afterward upon motion strike out his name. But in such case, if he consent to let a verdict be given against him, for as much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant.— In trespass, the defendant pleaded *quod actio non quia dicit* that *Richard Mawson*, named in the *simul cum* paid the plaintiff a guinea in satisfaction, and issue thereon; the defendant produced *Mawson*; and *per Eyre* Ch. Just. he may be examined, for what he is now to prove cannot be given in evidence in another action, and in effect he makes himself liable by swearing he was concerned in the trespass. But if the plaintiff can prove the persons named in the *simul cum* in trespass guilty, and parties to the suit, which must be by producing the original or process against them, and proving an ineffectual endeavour to arrest them, or that the process was lost, the defendant shall not have the benefit of their testimony.

Poplet v. James, Tr. 5 G. 2.

Reason v. Ewbank, H. 1 G. 1. per omnes just. Oct. Str. 19.

From what has been said, it appears, 1. That a *particeps criminis* may be witness for the plaintiff, though left out of the declaration for that purpose; yet this mightily lessens his credit, especially in trespasses where satisfaction from one is a discharge for all the rest. In a criminal prosecution, according to the opinion of some, he can only be a witness in two cases, *viz.* if he be actually pardoned; or if he have no promise of pardon. But others have holden that such a promise will be no exception to his competency, but only to his credit; therefore in *Layer*'s trial the court refused to let a witness be examined on a *voyer dire*, whether he had such a promise.

Keb. 17, 18.

2 Hawk. P.C. 434.

2. That husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same; nor against each other, because contrary to the legal policy of mariage. However there are some exceptions to this rule: first, in the case of high treason it has been said, that a wife shall be admitted as a witness against her husband, because the tie of allegiance is more obligatory than any other. Secondly, by the 5 *G.* 2. the wife of a bankrupt may be examined by the commissioners touching his estate, but not his bankruptcy. Thirdly, if a woman be taken away by force and married, she may be an evidence against her husband indicted on 3 *H.* 7. 2. against the stealing of women; For a contract obtained by force has no

obligation

obligation in law. So upon an indictment on 1 *Jac.* 1. *c.* 11. for marrying a ſecond wife, the firſt being alive, though the firſt cannot be a witneſs yet the ſecond may, the ſecond marriage being void: And whether a wife *de jure* may not be a witneſs againſt her huſband on an indictment for a perſonal tort done to herſelf, ſeems to be matter of doubt. In Lord *Audley*'s caſe ſhe was allowed to be a witneſs to prove her huſband aſſiſted to a rape upon her; and though this caſe has been denied to be law, yet it was in caſes where the indictment was not for a perſonal tort to the wife; and in the caſe of *Azyre*, on an indictment for the battery of the wife, Lord *Raymond* ſuffered the wife to give evidence; and the wife is always permitted to ſwear the peace againſt her huſband; and her affidavit has been admitted to be read on an application to the court of king's bench for an information againſt the huſband for an attempt to take her away by force after articles of ſeparation; and it would be ſtrange to permit her to be a witneſs to ground a proſecution upon, and not afterward to be a witneſs at the trial. Fourthly, in an action between other parties, the wife may be a witneſs to charge her huſband, *ex. gr.* to prove the goods, for which the action is brought, ſold on the credit of the huſband. — So perhaps in ſome caſes, in an action againſt her huſband, though ſhe will not be admitted to be a witneſs, yet a confeſſion of her's may be given in evidence to charge him: As where an action was brought for nurſing his child, the plaintiff was allowed to give in evidence, that the wife declared the agreement to have been for ſo much *per* week, becauſe ſuch matters are uſually tranſacted by the women.

1 Str. 633.

Lady Lawley's caſe.

Str. 504.

Str. 527.

But no other relation is excluded, becauſe no other relation is abſolutely the ſame in intereſt: Therefore in *Pendrel* and *Pendrel*, before Lord *Raymond*, which was an iſſue out of chancery to try whether the plaintiff were heir to *T. O.* the marriage and birth being admitted by order, the mother was admitted to prove the father had acceſs to her. So in *Lomax* and *Lomax* before lord *Hardwicke*, the mother was admitted to prove the marriage; and in an ejectment againſt *Sarah Brodie* at *Hereford* 1744, Mr. J. *Wright* admitted the father to prove the daughter legitimate; her title being as heir to her mother.

To conſider now the exceptions to this rule; that no perſon intereſted can be a witneſs.

1. Exception; A party interested will be admitted in a criminal prosecution in most instances.

Salk. 283. Vi. infra cont.

H. had a promise of a note of 5 *l.* from his mother-in-law, and by some slight got her hand to a note for 100 *l.* and it was holden by *Holt* at *Guildhall*, that the mother could not be a witness in an information for the cheat; for though the verdict cannot be given in evidence in an action upon the note, yet he said they were sure to hear of it to influence the jury: But in the King and *Bray*, Lord *Hardwicke* said, If this case had not been settled by so great a judge, it would go to the credit only, and not to the competency; and in *Far.* 119. it is said by *Holt*, That if a woman give a note or bond to a man, to procure her the love of *J. S.* by some spell or charm, in an indictment for the cheat, she shall be a witness, though it tend to avoid the note, for the nature of the thing allows no other evidence. So if the doing of the act, which he is now evidence to invalidate or set aside, were a mean to obtain his liberty, he shall be a witness, as in the case of a bond given by duress. The defendant was indicted for tearing a note, whereby he promised to pay so much money to *A. B.* who was produced as a witness, and notwithstanding it was objected that he was going to swear to set up his own demand, because, if convicted, the court would compel the defendant to give a new note, yet he was admitted.

Salk. 286. S. P. Far. 19. Str. 595.

Rex v. Nunes, P. 9 G. 2. Stra. 1043.

Mrs. *L.* gave a promissory negotiable note to the defendant in trust to assign it to Mrs. *T.* who was indebted to Mrs. *L.* the defendant broke his trust and negotiated the note; Mrs. *L.* having paid the note, brought a bill in chancery against the defendant, who, in his answer denied the trust, upon which he was indicted for perjury, and Lord *Hardwicke* refused to admit Mrs. *L.* to give evidence of the trust, and compared it to the case of forgery, where the person whose hand is forged is not admitted, and said it differed from the case of usury, where the party is admitted to be an evidence, if the money is paid; the reason of which is, being party to the crime, he will not be permitted to have any remedy for it again.

Abrahams v. Bunn, B. R. T. 8 G. 3.

And in a late case in which all the former resolutions were thoroughly considered, the court held that the person who borrowed money on a pawn was a good witness in an action for usury against the pawnbroker, though the payment of the money borrowed was proved by no other person but himself:

For

For the judgment in this action could not be given in evidence in an action against him for the money lent.

Though, as is said, a person whose hand is forged is not admitted to prove the forgery, yet under many circumstances he may, where he is not directly interested in the question; as in *Well's* case, who was indicted for forging a receipt from a mercer at *Oxford*, the mercer having before recovered the money in an action against *Wells*, was admitted to prove the forgery. Per Willes C. J. at Oxon.

So in an indictment for perjury on the statute, the person injured cannot be a witness, because the statute gives him ten pounds, but in an indictment at common law the party injured may be a witness. 2 Hawk. 433.

2. Exception; A party interested will be admitted for the sake of trade and the common usage of business.

Therefore a porter shall be evidence to prove a delivery of goods.—So a banker's apprentice to prove the receipt of money. So an indorsement on a bond by the obligee of the receipt of interest has been admitted to bring it within the twenty years. Searle v. Barrington.

3. Exception; A party interested will be admitted where no other evidence is reasonably to be expected.

As upon the statute of hue and cry, where the party robbed is admitted, even though he be himself plaintiff.

So in actions by informers for selling coals without measuring by the bushel, the servants are witnesses for their master, notwithstanding 3 *G.* 2. inflicts a penalty upon them for not doing it, though *Eyre* Ch. J. did, on that account, in two or three instances refuse to receive them. Per Lee Ch. J. in E. I. Comp. v. Gossing.

So where the question was, whether the defendants had a right to be freemen, though it appeared there were commons belonging to the freemen, yet an aldermen was admitted to prove them no freemen, it appearing that none but aldermen were privy to the transactions of the corporation with regard to making persons free. Rex v. Phipps and Archer at Cambr. per Lee Ch. J.

So where the question was, whether the master had deserted the ship, (*Sussex*) without sufficient necessity; a sailor, who had given bond to the master, (as a trustee for the company) not to desert the ship during the voyage, was admitted evidence for the master, it appearing all the sailors entered into such bonds. E. I. Comp. v. Gossing, 16 G. 2.

So where a son having a general authority to receive money for his father, received a sum, and gave it to the defendant; Salk. 289.

 the

the son was admitted as a good witness (his testimony being corroborated by other circumstances) for his father in an action of trover for the money.

Mic. 1752. C. B. at Westminster.

So in trover against a pawnbroker, the servant embezzling his master's goods, and pawning them, will be admitted to prove the fact.

4. Exception; A party interested will be admitted, where he acquires the interest by his own act after the party, who calls him as a witness, has a right to his evidence.

Skin. 586.

3 Lev. 132.

And therefore tho' one, who lays a wager at the time of the original wager, is no witness, yet one who lays a wager afterwards ought to be admitted; and perhaps a person who laid a wager at the same time will be admitted, in case he has received the money without any condition to return it; for the money will be intended to be duly paid.

Bent v. Baker, B. R. Hil. 29 G. 3.

A broker who effects a policy of insurance, and subscribes it himself after the defendant and several others had subscribed it, is a good witness for them, though he be a party to a suit in equity depending between the insurers and the insured, he offering to dismiss the bill with costs as to the plaintiff.

5. Exception; A party interested will be admitted where the possibility of interest is very remote.

2 Lev. 231. tamen quære, Whether this case be law.

As where an information, in nature of a *quo warranto*, was brought against the mayor, citizens, and commonalty of *London*, for taking two-pence *per* chaldron for all sea coals brought to *London*; freemen were admitted to prove the prescription, it appearing that the mayor and sheriffs have the whole profits of this toll, though they have it for the benefit of the corporation, of which all the freemen are members; yet these having no particular profit to themselves were sworn as witnesses; for it cannot be presumed, that, for an advantage so small, and so remote, they would be partial and perjure themselves. And *Scroggs* chief justice said, that it ought not to be a general rule, that members of corporations shall be admitted or denied to be witnesses in actions for or against their corporations; but every case stands upon its own particular circumstances, *viz.* whether the interest be so considerable as by presumption to produce partiality or not. —And this exception has of late years been a good deal extended. In the case of the king and *Bray*, *Hil.* 10 *G.* 2. lord chief justice *Hardwicke* said, that unless the objection appeared to him to carry a strong danger of perjury, and some apparent advantage might accrue to the witness, he was always inclined to let it go to his credit only, in order to let in a proper light to the case, which would otherwise be shut out; and, in a doubtful case he said it was generally his custom to admit the evidence,

dence, and give such directions to the jury as the nature of the case might require. That was an information in nature of *quo warranto* for the defendant to shew by what authority he claimed to be mayor of *Tintagel*, and issue taken upon this custom, *viz.* That at a court leet annually holden on the tenth of *October*, the mayor for the year ensuing is to be chosen, and for that purpose two elizors are to be nominated, one by the mayor, the other by the town clerk; these elizors are to nominate twelve jurymen, who are to present the mayor for the year ensuing; and in case the town clerk refuse to nominate his elizor, that then the mayor shall nominate the second elizor. At the trial *P. Hoskins*, who was second elizor, nominated by the mayor, upon the default of the town clerk's nomination at the election of the defendant, and *P. Hoskins* who served as a juryman at the said election, were both offered as witnesses to prove the custom, but rejected *in toto*, as not competent witnesses to any part of it: But upon motion a new trial was granted; the chief justice said, the having of an elizor is intended a franchise in the *borough*, but in the elizor himself it is only an authority, and the execution of it past and over. And he said he knew no case where a man who has acted under a bare authority has been refused to prove the execution of it. Persons that have been themselves in office, are often called to shew what the usage is, and what they did when in office, and yet if their acts be illegal, they are liable to *quo warranto*, and he said the case in 3 *Keb.* 90. was very material; for there, upon an issue to try whether by the custom of the manor the tenants were to pay fines and be re-admitted upon the death of the last admitting lord, the steward was admitted to prove the custom, though he had fees upon admission.

The second sort of persons excluded from testimony, are such as are stigmatized.

Now there are several crimes that so blemish the reputation, that the party is ever after unfit to be a witness; as treason, felony, and every *crimen falsi*, as perjury, forgery, and the like: For where a man is convicted of those glaring crimes against the common principles of humanity and honesty, his oath is of no weight.

The common punishment that marks the *crimen falsi*, is being set in the pillory, and therefore, anciently, they held that no man

man legally ſet in the pillory could be a witneſs; but the rigour of this piece of law is reduced to reaſon; for now it is holden, that unleſs a man be put in the pillory *pro crimine falſi*, as for perjury or forgery, or the like, it is no blemiſh to his atteſtation; it is the crime and not the puniſhment that makes the man infamous; therefore where a man was convicted of barratry, though he was only fined, the Court held him incompetent; ſo a perſon convicted of petit larceny is equally infamous with one convicted of grand larceny, for they are both felony.

Salk. 690.

Mackinder's caſe, Hil. 27 G. 2. C. B.

After a general ſtatute pardon a perſon attainted is a good witneſs; and ſo it is after burning in the hand, which amounts to a ſtatute pardon.

If one found guilty on an indictment for perjury at common law, be pardoned by the king, he will be a good witneſs, becauſe the king has power to take off every part of the puniſhment; but if a man be indicted of perjury on the ſtatute, the king cannot pardon, for the king is diveſted of that prerogative by the expreſs words of the ſtatute.

Note; The party who would take advantage of this exception to a witneſs, muſt have a copy of the record of conviction ready to produce in court.

Thirdly, Infidels cannot be witneſſes, *i. e.* ſuch who profeſs no religion that can bind their conſciences to ſpeak truth. But when any perſon profeſſes a religion that will be a tie upon him, he ſhall be admitted as a witneſs, and ſworn according to the ceremonies of his own religion; for it would be rediculous to ſwear a witneſs upon the Holy Evangeliſts, who did not believe thoſe writings to be ſacred. The Jews are always ſworn upon the Old Teſtament; Mahometans on the Koran; thoſe of the Gentoo religion according to the ceremonies of that religion, &c.

Fourthly; Perſons excommunicated cannot be witneſſes, becauſe being excluded out of the church, they are ſuppoſed not to be under the influence of any religion.

2 Bulſ. 155.

Fifthly; The ſame law, it is ſaid, holds place in relation to popiſh recuſants. This opinion is founded on the ſtatute of 3. *Jac.* 1. *c.* 5. which enacts, That every popiſh recuſant convict ſhall ſtand, to all intents and purpoſes, diſabled, as a perſon lawfully excommunicated: But Mr. ſerjeant *Hawkins*, in his Pleas of the Crown, vol. the 1ſt. fol. 23, 24, has

has very sensibly said, that this construction is over severe, as the purport of the statute is satisfied by the disability to bring any action.

But persons outlawed may certainly be witnesses, because they are punished in their properties and not in the loss of their reputation, and the outlawry has no manner of influence on their credibility. Co. L. 6.

As to those who are excluded from testimony for want of skill and discernment, they are ideots, madmen and children.

In regard to children, there seems to be no precise time fixed wherein they are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination to the Court.

On an indictment for assaulting an infant of five years of age with intent to ravish her, the child shall be received as a witness if she appear to have any notion of the obligation of an oath: And it was agreed by all the judges, that a child of any age if she were capable of distinguishing between good and evil might be examined on oath, and consequently, that evidence of what she had said ought not to be received. Brazier's case, 12 April, 1779.

In cases of foul facts done in secret, where the child is the party injured, the repelling their evidence intirely is, in some measure, denying them the protection of the law; yet the levity and want of experience in children, is undoubtedly a circumstance which goes greatly to their credit.

I have, in the course of the foregoing survey, necessarily taken notice of some of the more general rules; but for better understanding the true theory of evidence it will be proper to take a view of them all together.

The first general rule is, That you must give the best evidence that the nature of the thing is capable of: The true meaning of this rule is, that no such evidence shall be brought, that *ex natura rei* supposes still a greater evidence behind in the parties' possession, or power; for such evidence is altogether insufficient and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the Court? As if a man offer a copy of a deed or will, where he ought to produce the original,

this

this carries a presumption with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence; but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: The presumption of greater evidence behind in the party's possession being overturned by positive proof.

Ante 283, &c. The second general rule is, That no person interested in the question can be a witness: There is no rule in more general use, and none that is so little understood; I have therefore endeavoured in the foregoing part to explain it, and set down the several exceptions to it; and I can add nothing to what I have said upon the subject.

The third general rule is, That hearsay is no evidence. For no evidence is to be admitted but what is upon oath; and if the first speech were without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice. Besides if the witness be living, what he has been heard to say, is not
1 Mod. 283. the best evidence. But though hearsay be not allowed as direct evidence, yet it has been admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still constant
Holliday v. Sweeting. Mic. 16 G. 3. to himself: But clearly it is not in evidence in chief, and it seems doubtful whether it is so in reply or not.

So where the issue is on the legitimacy of the plaintiff or defendant, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married; and with reason, for the presumption arising from the cohabitation is either strengthened or destroyed by such declarations, which are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief one way or
Ante 113. other. But in *Pendrel* and *Pendrel*, *Hil.* 5 *G.* 2. Lord *Raymond* would not suffer the wife's declarations, that she should not know her husband by sight, *&c.* to be given in evidence till after she had been produced on the other side. So hearsay is
Grimwade and Stephens, Kent, 1697. good evidence to prove, who is my grandfather, when he married, what children he had, *&c.* of which it is not reasonable to presume I have better evidence. So to prove my father, mother, cousin

cousin or other relation beyond the sea dead, and the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence if a person swore that a brother or other near relation had told him so, which relation is dead. In an ejectment between the duke of *Athol* and lord *Ashburnham*, *E.* 14 *G.* 2. Mr. *Sharpe*, who was attorney in the cause, was admitted to prove what Mr. *Worthington* told him he knew and had heard in regard to the pedigree of the family, Mr. *Worthington* happening to die before the trial. So in questions of prescription it is allowable to give hearsay evidence in order to prove a general reputation; and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. In a *quare impedit* the plaintiff derived his title from lord *R.* on whom he laid a presentation of one *Knight*; the bishop set up a title in himself, and traversed the seisin of lord *R.* The plaintiff gave in evidence an entry in the register of the diocese of the institution of *Knight*, in which there was a blank in the place, where the patron's name is usually inserted, upon which he offered parole evidence of the general reputation of the country, that *Knight* was in by the presentation of lord *R.*—Upon a bill of exceptions this came on a writ of error into *K. B.* where the better opinion was that the evidence was allowable; the register which was the proper evidence being silent. A presentation may be by parol, and what commences by parol, may be transmitted to posterity by parol, and that creates a general reputation.

Skinner v. Ld. Bellamont, Worcester, 1744. Bp. of Meath v. Ld. Belfield, 1747.

The fourth general rule is, that in all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally. This has sometimes occasioned a question in chancery, whether it were in issue or not. As where a bill was brought by a kept mistress for an annuity; the defendant in his answer said, "She was a lewd woman of infamous character before Mr. *P.* became acquainted with her; and it was holden to be sufficiently putting her character in issue, to enable the defendant to prove particular facts. But where upon a bill

Clerk v. Periam, 27 July, 1742.

Ld. Doneraile v. Lady Doneraile in Dom. Proc. 1734. Roberts v. Malston, per Willes, C. J. at Hereford, 1745.

brought by a wife the hufband in his anfwer faid, "She had not behaved herfelf with duty and tendernefs to him, as became a virtuous woman, much lefs his wife;" this was holden not to put adultery in iffue, fo as to enable the hufband to prove particular facts. In an action for criminal converfation, the defendant may give in evidence particular facts of the wife's adultery with others, or having a baftard before marriage; becaufe by bringing the action, the hufband puts her general behaviour in iffue. And as the defendant may examine to particular facts, *a fortiori* he may call witneffes to her general character. So in cafes where the defendant's character is put in iffue by the profecution, the profecutor may examine to particular facts, for it is impoffible without it to prove the charge. Yet there is one cafe of that fort in which the profecutor is not allowed to examine to any particular fact without giving previous notice of it to the defendant; and that is, where a man is indicted for being a common barretor; and the reafon is, fuch indictments are commonly againft attornies, whofe profeffion it is to follow law-fuits; and it is a difficult matter to draw the line between that and acting as a barretor; therefore it makes it neceffary for him to know what particular facts are to be given in evidence, that he may be prepared to fhew, that he was fairly employed in thofe cafes, and acted in his profeffion. But in other criminal cafes, the profecutor cannot enter into the defendant's character, unlefs the defendant enable him fo to do, by calling witneffes in fupport of it, and even then the profecutor cannot examine to particular facts, the general character of the defendant not being put in iffue, but coming in collaterally.

Goodright ex dem. Faro v. Hicks, Winton, fummer affizes 1789. cor. Buller J.

In an ejectment by an heir at law to fet afide a will for fraud and impofition committed by the defendant, he fhall not be permitted to call witneffes to prove his general good character.

For the fame reafon if you would impeach the credit of a witnefs, you can only examine to his general character, and not to particular facts; every man is fuppofed to be capable of fupporting the one, but it is not likely he fhould be prepared

pared to answer the other without notice; and unless his general character and behaviour be in issue, he has no notice.

But other witnesses may be called to impeach his credit respecting any matter relative to the issue: for whatever is material to the issue, each party must come prepared to support or deny. But a party never shall be permitted to produce general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him and to make him a good witness if he spoke for him with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only.

Hardwell v. Jarman, Taunton Spring assizes, 1789. cor. Buller J. Hastings's case per Lord Chancellor 11th June 1789. in Dom. Proc.

If a particular fact go to the competency of a witness, it may be proved by other testimony, as the copy of a record for perjury, felony, &c. So of an interest in a witness in the event of a cause: and whether he be interested or not shall be decided by the judge.

Ib. and per Ashhurst. J. Taunton Summer Ass. 1773. After consulting B. Adams.

The fifth general rule is, *Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum, verificatione facti tollitur.* Therefore where the testatrix devised her estate to her cousin *John Cheere*, there being both father and son of that name, parol evidence was admitted to prove that the son was the person meant; for the heir's objection arose from parol evidence, and therefore parol evidence ought to be admitted to answer it. So if a man having two manors called *Dale*, levy a fine of the manor of *Dale*, circumstances may be given in evidence to prove which manor he intended; for this is not to contradict the record, but to support it. Lord *Bacon*, in his reading upon this maxim, distinguishes ambiguity into *patens* and *latens*, and saith that *latens* is that which seems certain and without ambiguity, for any thing that appears upon the deed or instrument; but there is some collateral matter out of the deed that breeds the ambiguity; but *ambiguitas patens*,

Jones and Newman, Tr. 24 G. 2. Cheney's case, 5 Co. S. P.

2 R. A. 676.

patens, *i. e.* that which appears to be ambiguous upon the deed or inſtrument, is never holpen by averment; for that were in effect to make that paſs without deed, which the law appoints ſhall not paſs but by deed; therefore where the deviſee's name is totally omitted, parol evidence can not be admitted to explain an ambiguity which is patent, much leſs will it be admitted to alter the apparent meaning of the will: therefore when a man gave two thouſand pounds to his brother *John*, and in caſe of his death, to his wife, lord chief juſtice *Lee* would not ſuffer proof to be given that the teſtator meant his brother ſhould have it only during life. But where *A.* deviſed four hundred pounds to his wife, and made her executrix, without diſpoſing of the ſurplus; lord chancellor *Hardwicke* admitted parol evidence to ſhew the teſtator meant his wife ſhould have it, for there was no ambiguity in the will, nor was it to alter the apparent intent of the teſtator; for by law ſhe was intitled to the ſurplus as executrix, therefore the evidence was admitted only to rebut the equity. But in *Brown* and *Selwin*, in *Dom. Proc.* 1734, the teſtator having expreſsly deviſed the reſidue of his perſonal eſtate to his executors, one of whom owed him money upon bond, parol evidence was refuſed to be admitted to prove the teſtator meant to extinguiſh the bond debt by making the obligor executor; for that would have been to have altered the apparent intent, and not ſimply to have rebutted an equity.

Ballis and Church v. Att. Gen. 29 Jan. 1741, per Hardw. Canc.

Lowfield and Stoneham, G. Hall 1746.

Lake and Lake, 8 Nov. 1751.

The ſixth general rule is, in every iſſue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is ſufficient to deny what is affirmed until it be proved; but when the affirmative is proved, the other ſide may conteſt it with oppoſite proofs; for this is not properly the proof of a negative, but the proof of ſome propoſition totally inconſiſtent with what is affirmed; as if the defendant be charged with a treſpaſs, he need only make a general denial of the fact; and if the fact be proved, then he may prove a propoſition inconſiſtent with the charge as that he was at another place at the time, or the like.

But

But to this rule there is an exception of such cases where the law presumes the affirmative contained in the issue. Therefore in an information against lord *Halifax* for refusing to deliver up the rolls of the auditor of the exchequer; the court of exchequer put the plaintiff upon proving the negative, *viz.* that he did not deliver them; for a person shall be presumed duly to execute his office till the contrary appear.

The seventh general rule is, that no evidence need be given of what is agreed by the pleadings: For the jury are only sworn to try the matter in issue between the parties, so that nothing else is properly before them. In replevin the defendant avowed taking the cattle, damage feasant *in loco in quo*, as parcel of his manor of *K.* the plaintiff replied, that it was parcel of the manor of *K.* and made title to it, and traversed that the manor of *K.* was the freehold of the defendant: He was not admitted to prove that *K.* was no manor, for that is admitted by the traverse. Dy. 183. C. 58.

The jury cannot find any thing against that which the parties have affirmed and admitted of record, though the truth be contrary; but, in other cases, though the parties be estopped to say the truth, the jury are not; as in *Goddard*'s case, where the bond was dated nine months after the execution, and after the death of the obligor. 2 Co. 4. b.

In trespass for throwing down and carrying away stalls, as to all the trespass but the throwing them down, the defendant pleaded not guilty; and as to the throwing them down a special justification, and therein justified both the throwing down and carrying away; and on the issue joined, the judge at the assizes would not try, whether the defendants were guilty or not of carrying away the stalls, because they had confessed it by their justification; and on motion for a new trial it was denied, because the jury could never find the defendants not guilty, contrary to their own confession upon the record, though in another issue. P. 4 Anne, K. B. Salk. MSS. Note: This case was before the stat. enabling defendants to plead double.

The eighth general rule is, That whensoever a man cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue. For example, *A.* cannot justify the killing another, therefore he may give the special matter in evidence on the general issue, as that it was 2 R. A. 682. Co. L. 283.

1 Jones 240. *se defendendo, &c.* So in trover for goods, the defendant may give in evidence, that he took them for toll on the general iſſue of not guilty, becauſe he could not plead it; but it would be otherwiſe in treſpaſs for taking the goods, becauſe there he might have pleaded it.

Co. L. 282. Hob. 53. The ninth general rule is, that if the ſubſtance of the iſſue be proved, it is ſufficient. In an action of waſte for cutting twenty aſhes, proof that he cut ten is ſufficient, for, in effect, the iſſue is waſte or no waſte. Hob. 55. So in debt upon a bond conditioned to perform covenants, and breach aſſigned in cutting down twenty trees. 2 Rol. 706. So in account, if the defendant plead an account before *A.* and *B.* and iſſue thereon, proof of an account before *A.* is ſufficient. But if the iſſue were, whether *A.* and *B.* were churchwardens, proof that one was and not the other would not be ſufficient?

If the iſſue be, whether lord *Delaware* demiſed, proof that *A. B.* who was not then, but now is, lord *Delaware*, is not ſufficient, for whether he were at the time of the demiſe, lord 2 Rol. Abr. 706. *Delaware*, is part of the iſſue. So in replevin, if the defendant avow damage feaſant, and the plaintiff juſtify for common, and aver that the cattle were levant and couchant, and iſſue thereon, proof only for part of the cattle is not ſufficient.

1 Sid. 5. The plaintiff declared, that he had *J. S.* and his wife in execution, and that the defendant ſuffered them to eſcape.—Special verdict that the huſband only was taken in execution, (it being for a debt due from the wife before coverture) and that he eſcaped. The court held that the ſubſtance of the iſſue was found and gave judgment for the plaintiff.

March 25. In error to reverſe a fine, for that the plaintiff was beyond, *&c.* If the defendant plead that the plaintiff returned into the realm in *Auguſt*, and iſſue thereupon, if it be proved that he returned at any time within five years it is ſufficient. Hob. 53, 4. In debt againſt an executor the defendant pleads that the teſtator was taken in execution by a *ca. ſa.* if it be proved that he was taken by an *alias ca. ſa.* it is enough, but proof that he had been taken by a *capias pro fine*, or by a *capias utlagatum*, would not maintain the plea. If outlawry at the ſuit of *A.* be pleaded, and the record prove outlawry at the ſuit of *C.* it is ſufficient.

Cr. Car. 151. Debt upon bond againſt the defendant, as brother and heir to *J. S.* upon iſſue *riens per deſcent*, the jury found that the

obligor was seised in fee, had issue and died seised, and that the issue died without issue, whereupon the land descended to the defendant, as heir to the son of his brother, and the court held that the issue was found against the plaintiff; for the defendant had nothing as immediate heir to his brother, and if he would charge him as collateral heir, he ought to have a special declaration. Dy. 368.

But if *A.* settle an estate upon himself for life, remainder to his first and other sons, in tail, remainder to his own right heirs, and enter into a bond and die, leaving a son who dies without issue, whereupon the uncle enters, he may be charged as brother and heir of *A.* for he must make himself heir to him who was last actually seised. Carth. 126.

It is necessary towards the better comprehending of this rule, to see in what cases *modo et forma* is of the substance of the issue; for where it is, it must be proved.

Where the issue is joined on the point of the action, there *modo et forma* is mere form, and need not be proved; as where a demandant *in casu proviso* counts of an alienation in fee, and the tenant says, *non alienavit modo et forma*, and the jury find (or evidence is given of) an alienation in tail, it is sufficient; for the point and gist of the writ is, whether tenant in dower aliened to the disherison of the demandant. So in replevin, where the defendant avowed the taking, as a commoner, damage feasant, the plaintiff in bar said *J. S.* was seised of an house and land, whereto he had common, and demised unto him the thirtieth of *March*, to hold from the feast of the *Annunciation* next before for a year, the defendant traversed the lease *modo et forma*; the jury found that *J. S.* made a lease to the plaintiff on the twenty-fifth of *March* for one year; and though this be not the same lease as pleaded, for this begins on the day, and the other from the day, yet the plaintiff had judgment; for the substance of the issue is, whether the plaintiff have such a lease, as by force thereof he might use the common. Yet it must not depart altogether from the form of the issue, as if it had been found that he had a right of common by lease from another. Co. L. 281. Hob. 72.

L. brought an action upon a promissory note of thirty pounds, to which the defendant pleaded that the plaintiff was indebted to him in a larger sum, *scilicet* sixty pounds, which far exceeded Langdon v. Knight.

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the damage laid in the declaration; the plaintiff replied, that he was not indebted to the defendant in the ſum of ſixty pounds *modo et forma*, and on demurrer (for the plaintiff might, for any thing appearing to the contrary in his replication, owe the defendant fifty-nine pounds, nineteen ſhillings, and eleven pence halfpenny; and therefore it was inſiſted, that he had tendered an immaterial iſſue) the court held that the ſubſtance of the replication was, that the plaintiff was not indebted to the detendant in ſo much as would exceed his own demand in the declaration, and that was the queſtion for the court and jury, whether he were ſo indebted to the defendant as to exceed his demand, and not preciſely how much; and a caſe was cited by Mr. *Filmer*, which was allowed to be law, where in debt upon bond conditioned to pay one thouſand pounds, the defendant pleaded that at the time of the bill the plaintiff owed the defendant fifteen hundred pounds, to which the plaintiff replied, that he was not indebted to him in fifteen hundred pounds *modo & forma*, as alledged, and iſſue thereon, and verdict for the plaintiff, and upon motion in arreſt of judgment, one queſtion was, whether the iſſue were well joined, and the court held it was.

Joy v. Roberts, Tr. 5 & 6 G. 2. in Scac.

1 Salk. 260.

Covenant by a leſſee againſt his leſſor, and breach aſſigned on the covenant for quiet enjoyment, for that the leſſor ouſted him,—the defendant pleaded that he entered to diſtrain for rent, and traverſed that he ouſted him *de præmiſſis*; the plaintiff demurred, for that he did not traverſe that he ouſted him *de præmiſſis* or of any part thereof. *Sed per curiam* the plea is good, and proof of any part, had the plaintiff joined iſſue, would have been ſufficient.

Co. L. 282.

But when a collateral point in pleading is traverſed, then *modo et forma* is of the ſubſtance of the iſſue and muſt be proved; as if a feoffment be alledged by two, and this is traverſed *modo et forma*, and it is found the feoffment of one, there *modo et forma* is material: So if a feoffment be pleaded by deed, and it is traverſed *abſque hoc quod feoffavit modo et forma*, the jury cannot find a feoffment without deed. But though the iſſue be upon a collateral point, yet if by finding part of it, it ſhall appear to the court that no ſuch action lies for the plaintiff, no more than if the whole had been found, there *modo et forma* are but words of form; as in treſpaſs, *quare vi et armis*, if the defendant plead, that the plaintiff holds of him by fealty

and rent, and for rent behind, he came to distrain, and the plaintiff deny that he holds of him *modo et forma*, and the jury find (or evidence prove) that he holds of him by fealty only, the writ shall abate, for by the statute of *Marlb. c.* 3. no tenant can maintain trespass against his lord, so the matter of the issue is, whether he hold of him or not; but it would have been otherwise in replevin, for there the avowant being to have a return must make a good title *in omnibus*.

PART VII.

Containing ONE BOOK.

Of General Matters relative to Trial.

INTRODUCTION.

HAVING in the feveral foregoing parts of this work taken notice of the various actions which may be brought, the feveral iffues that may be joined thereon, and the evidence which is proper to be admitted on fuch iffues, as alfo of the nature of evidence in general, and of fuch rules relating thereto as are univerfal and equally applicable to all cafes, I fhall conclude by treating of fome other general matters relative to trials at *Nifi Prius* under the following heads.

1. Of juries.
2. Of pleas *puis darraign* continuance.
3. Of abatement by the death of parties.
4. Of demurrer to evidence.
5. Of bills of exception.
6. Of defects amendable after verdict, or aided by it.
7. Of new trials.
8. Of cofts.

CHAPTER I.

Of Juries.

AT common law the iſſue was tried in the court where the ſuit was depending; but this being attended with great inconvenience and expence, the ſtatute of *Weſtminſter* 2. *c.* 30. ordained that all pleas in either bench, which require only an eaſy examination, ſhall be determined in the country before the judges of aſſize.

This was the origin of trials at *niſi prius*, the 42 *E.* 3. *c.* 11. afterwards regulated the proceſs of the *venire*, &c. and put them upon the foot they now are.

N. B. The ſtatute of *Weſtminſter* 2. extending only to the courts of *K. B.* and *C. B.* whenever an iſſue is joined in the exchequer, and to be tried in the county, there is a particular commiſſion authorizing the judges of aſſize to try it.

Before the ſtatute of 3 *G.* 2. the ſheriff uſed to return a ſeparate jury in every cauſe; but that act ordains that he ſhall return only one panel for the trial of all cauſes, ſuch panel not to conſiſt of leſs than 48, nor more than 72, (without the particular order of the judges who go the circuit) and their names are to be put into a box, and drawn in the manner we daily ſee.

However, as there is a clauſe in that act empowering the court upon motion to grant ſpecial juries, it will be proper to take ſome notice of what is particularly relative to them, before I enter into ſuch matters as are equally relative to juries in general.

From the penning of the act it appears to extend only to trial of any iſſue joined, therefore the court will not grant a ſpecial jury upon a writ of enquiry. Symonds v. Parminter, M. 21 G. 2.

The method of ſtriking ſpecial juries is, for the ſheriff to attend the ſecondary or maſter with his book of freeholders at the time appointed by the maſter for that purpoſe, who is to give notice to their attornies on both ſides to be preſent, the maſter then takes 48, out of which each party ſtrikes 12, and the remaining 24 are returned. If only the attorney on one

 ſide

fide attends, the mafter is to ftrike out the 12 for him who is abfent.

In order to prevent improper applications for fpecial juries, the 3 *G.* 2. enacted, that the party applying for fuch fpecial jury to be ftruck fhould pay the fees for ftriking, and not be allowed the fame upon taxation of cofts. However, that being the fmalleft part of the expence was found infufficient, therefore the 24 *G.* 2. *c.* 18. enacts, that he fhall pay all the expences of the fpecial jury, and fhall not be allowed it in cofts, unlefs the judge certify in open court on the back of the record, that it was a caufe proper to be tried by a fpecial jury.— And in order to leffen the expence of fpecial juries, the fame act directs that no fpecial juryman fhall have more than one guinea for his attendance.

Rex v. Johnfon. tamen q.

The party at whofe requeft the fpecial jury was ftruck may, notwithftanding that, challenge the array. So he may challenge the polls. And if from fuch challenges, or from non-attendance there are not fufficient to make a jury, either party may pray a tales. The ufual method now-a-days is to draw fuch tales out of the box; though where it is defired by the gentlemen of the panel who appear, and confented to by the parties, the fheriff may return fuch other gentlemen as can be procured to attend, to whom the parties have no objection, though by the 7 & 8 *W.* 3. *c.* 23. *f.* 3. the fheriff is directed to return fuch as are returned upon fome other panel. And note; that in indictments and informations neither the profecutor nor the defendant can pray a tales without a warrant from the attorney general.

1 Lev. 223. 6 Mod. 246.

To come now to fuch matters as are relative to juries in general.

And firft, as to their having a view, the 4 & 5 of *Ann* enacts, that where it fhall appear to the court to be proper the jury fhould have a view, the court may order fpecial writs of *diftringas* or *habeas corpus* to iffue, by which the fheriff fhall be commanded to have 6 out of the firft 12 of the jurors named in fuch writs, or fome greater number of them, at the place in queftion, fome convenient time before the trial, who fhall there have the matters in queftion fhewed to them by perfons appointed by the court.

And by the 3 *G.* 2. where a view fhall be allowed, 6 of the jurors who fhall be named in fuch panel, or more who fhall be

mutually

mutually assented to by the parties, or in case of their disagreement, by the proper officer of the court, shall have the view, and shall be first sworn to try the cause before any drawing out of the box, pursuant to that act.

N. B. The usually way of granting views now is on the parties entering into a rule by consent, that in case no view be had, (as if no jurors attend) or if a view be had by any of the jurors whomsoever, (though not being six of the first twelve) yet the trial shall proceed, and no objection be made on account thereof, or for want of a proper return. *Burr.* Rep. part 4. vol. 1. p. 256.

Having now brought the jury to the bar, the next thing to be looked into is the doctrine of challenges.

Challenges may be either to the array, or to the polls.

Challenges to the array are on account of the partiality or insufficiency of the sheriff, or other officer returning the jury.

If the sheriff be liable to the distress of either party, or in his service, or related, or contributory to the expences of the cause, the array may be well challenged.

Before the 4 & 5 *Ann* the want of hundredors used to be a frequent cause of challenge. But by that act and the 23 *G.* 2. the *venire* is always to be *de corp. comitatus.*

So before the 23 *G.* 2. it was a good cause of challenge, that there was no knight returned in a cause wherein a lord of parliament was party.

If either party be apprehensive that the other side will challenge the array on account of relationship or interest in the sheriff, the right way in order to save time is for him to suggest such matter to the court, and pray a *venire* to the coroners, and if all of them be interested, then to two elizors to be appointed by the court. If upon shewing cause the other party admit the fact, the process shall be directed accordingly. If the other party deny the fact, the process shall be directed to the sheriff, and the other party shall not afterward be admitted to challenge the array on that account. Co. L. 137. b. Dy. 367. 5 Co. 36. b.

If the suggestion be that the sheriff is related to the other party, or interested on the other side; if that be denied, the court will order it to be tried, and then direct the process according to the event of such trial.

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If the challenge to the array be determined againſt the party, he may afterward have his challenge to the polls, but neither party ſhall take a challenge to the polls which he might have had to the array. It is to be ſeen therefore what is a good cauſe of challenge to the polls.

Palm. 363. If the jury upon a view hear evidence, it is a good cauſe of challenge, and ſuch a miſdemeanor for which they may be puniſhed by the court.

By 4 & 5 *W. & M.* All jurors, other than ſtrangers upon trials *per medietatem linguæ*, muſt have 10 *l.* a year, of freehold or copyhold lands, or ancient demeſne, or in rents in fee or for life, and by 3 *G.* 2. 20*l.* a year leaſehold, over and above the reſerved rent, is a qualification, the leaſe being for the abſolute term of 500 years or more, or for any other term determinable upon lives.

The jurors ought to be *omni exceptione majores*; therefore if a juryman be related to either party, or intereſted in the cauſe, or have declared his opinion, or have been arbitrator in the cauſe, it is a good cauſe of challenge; but I do not enter at large into theſe matters, becauſe ſince the 3 *G.* 2. by which one panel is returned for the whole county, and not leſs than 48 in ſuch panel, cauſes of challenge to the polls are not ſo minutely entered into as formerly.

Hob. 235. It is a rule, that there can be no challenge to the array before a full jury appears, for if there be not a full jury the cauſe will remain *pro defectu juratorum*; therefore if a full jury do not appear, the party who intends to challenge the array may pray a tales, and afterward challenge the jury; but the challenge muſt be made before any of the jury are ſworn.

So if you would challenge the polls, you muſt do it before the juryman is ſworn.

Skin. 101. In what manner the truth of the challenge, when it is denied, is to be tried by triers appointed for that purpoſe, may be ſeen at large in *Co. Lit.* therefore need not be repeated. But if a challenge be taken, and the other ſide demur, and upon debate the judge over-rule it, it is to be entered on the original record, and then advantage may be taken of it above. But if the judge over-rule the challenge without a demurrer, it is proper for a bill of exceptions.

Having

Having now seen in general how a jury is to be got together, it is necessary to enquire what ought to be their behaviour after they are sworn.

An officer of the court ought always to be placed at the door of the box where they sit, to prevent any one from having communication with them. And when they depart from the bar, they are to be attended by a bailiff sworn for that purpose.

The jury after going out of court shall have no evidence with them, but what was shewn to the court as evidence, nor that without the direction of the court. The court may permit them to take with them letters patent, and deeds under seal; and the exemplification of witnesses in chancery if dead, but not a writing without seal unless by consent of parties: But though the jury take with them patents, deeds, *&c.* without leave of the court, or writings without seal, books, *&c.* without consent of court or party, it shall not avoid the verdict, though they be taken by the delivery of the party for whom the verdict was given. So though one of the jury shew a writing, which was not given in evidence to his companions. But if they examine witnesses by themselves, though the same evidence which was given in court, it would avoid the verdict; but they may come back into court to hear the evidence of a thing whereof they are in doubt. So if the party for whom the verdict is given, or any for him, deliver a letter or other writing not given in evidence, it will avoid the verdict. And note; such cause must be returned upon the *postea*, or made parcel of the record, otherwise it will not stay judgment, or be error. 2 R. A. 686. Cr. E. 411. 2 R. A. 687. Co. L. 411. Cr. E. 616. 2 R. A. 714. Cr. E. 411. 2 R. A. 676. Co. L. 227. Cr. E. 616.

It is fineable for the jury to eat at their own charge after they are departed from the bar: But it will not avoid the verdict, as it will if they eat at the charge of him for whom the verdict was given, before they are agreed on their verdict. (But note, this ought to be certified by the judge on the *postea*.) But they may eat at his charge after a privy verdict. Cr. E. 227. Cr. J. 21.

CHAPTER II.

Of Pleas *puis darraign Continuance.*

AS matter may happen during the continuance of a fuit, which may give the defendant a plea in his defence which he had not to make at the commencement of the action, it is to be feen what pleas *puis darraign continuance* are good, and what fhall be done upon them; I will confine myfelf however to fuch as may be tendered at *nifi prius*, and they may be either in abatement or in bar.

Yelv. 180. If after iffue joined in ejectment the plaintiff enter into part of the premiffes, the defendant may plead it in abatement.

If after the laft continuance the plaintiff give the defendant a releafe, he may plead it in bar.

If the plaintiff be outlawed in a civil fuit, or excommunicated fince the laft continuance, it may be pleaded in bar: fo if feme plaintiff have taken baron. So in debt by one as adminiftrator, the defendant may plead that the plaintiff's letters of adminiftration are revoked *puis darraign continuance.*

Cr. E. 49. It feems dangerous to plead any matter *puis darraign continuance*, unlefs you be well advifed, becaufe if that matter be determined againft you, it is a confeffion of the matter in iffue, and no *nifi prius* fhall be granted. And the plea put in cannot be amended after the affizes are over: but it may during the affizes be amended before the judge of *nifi prius.*

Yelv. 181. Freeman 252.

Ibid. 3 Mod. 307. It is in the breaft of the judge whether he will accept of fuch plea or not, *i. e.* whether he will or will not proceed in the trial, therefore the party ought to make it appear to the judge that it is a true plea; yet the plaintiff is not to reply to this plea at the affizes, for the judge has no power to accept of fuch replication, nor to try it, but only to return the plea as parcel of the record of *nifi prius*; and if the plaintiff demur, it cannot be argued there.

Yelv. 141. Freeman 112. All. 66. It is not good pleading to fay, *quod poft ultimam continuationem* fuch a thing happened; but he muft alledge precifely the very day, time, and place, for the *venue* muft be laid in this as in all other pleas.

Thefe

These pleas are twofold, in abatement, and in bar, if any thing happens pending the writ to abate it, this may be pleaded *puis darraign continuance*, though there be a plea in bar; for this only waives all pleas in abatement that were in being at the time of the plea in bar pleaded, but not matter subsequent: and though pleaded in abatement, yet after plea in bar pleaded, it is peremptory as well on demurrer as on trial, because after a plea in bar pleaded, which is an answer in chief, the defendant can never have judgment to answer over. Gilb. Hist. of C. B. 84. Freem. 252.

When it is pleaded in abatement, it must conclude *quod breve cassetur*, when in bar *quod actionem ulterius manutenere non debet*, and not that the former inquest should not be taken; because it is a substantive bar in itself, and comes in the place of the former, and therefore must be pleaded to the action. Gilb. ubi supra Lutw. 1143. Cro. Eliz. 49. Dy. 361. a.

Note; A plea *puis darraign continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict. Pearson v. Perkins, Hil. 3 G. 1.

Note; Likewise there are some *pleas* which may be pleaded at *Nisi Prius* that cannot properly be termed pleas *puis darraign continuance*, because the matter pleaded need not be expressly mentioned to have happened after the last continuance. Thel. Dig. 204.

As in trespass after issue joined the defendant may plead that the plaintiff was outlawed of felony without saying after the last continuance. So he may in like manner plead that the plaintiff was covert the day of the writ purchased, though he cannot plead that the plaintiff took baron pending the writ, without pleading it after the last continuance.—The diversity seems to be between such things as disprove the writ in fact, and such as disprove it in law. Br. Continuance 57.

The last continuance where such plea is pleaded at the assizes, is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *distringas* or *habeas corpus* till the next term *nisi prius*, &c.

If the matter of the plea arise by deed it ought to be pleaded with a *profert*. Salk. 519.

The form of the plea, if at the assizes, is as follows: "and "now at this day, that is to say, &c. comes the said *C. D.* "by *R. H.* his counsel, and says, that the said *A. B.* ought "not further to maintain this action against him the said

"*C. D.*

"*C. D.* because he says that after the day of last "past, from which day until the day of in *Mic.* "term next (unless the justices of our lord the king, assigned "to hold the assizes of our lord the king in and for the "county of *C.* should first come on the day of "at *B.* in the said county of *C.*) the action aforesaid is con-"tinued, to wit, on, &c. at, &c. the said *A. B.* by his deed "dated, &c. did release"——And so shew the particular matter, and conclude, "And this he is ready to verify, "wherefore he prays judgment if the said *A. B.* ought fur-"ther to maintain this action against him," &c.

3 Lev. 110.

In trespass against four, after several continuances three of them plead the death of the fourth after the last continuance, *et petunt judicium de brevi et quod breve illud cassetur*. And on demurrer the conclusion of the plea was holden to be bad; for it should have been, *petunt judicium si curia ulterius procedere vult*, because in fact the writ was abated before by the death of the party.——Had it been a matter which only made the writ abateable, such conclusion seems right.

Bro. Continu. pl. 5 & pl. 41. Jenk. 160.

Note; It seems agreed that the defendant can have but one plea after the last continuance.

Freem. 252.

Where a plea is certified on the back of the *postea*, and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, refuses to do so, the plaintiff may sign judgment.

CHAPTER III.

Of Abatement by the Death of Parties.

THIS was a curious learning as it stood at common law in such cases where there were more plaintiffs and defendants than one; for the rule laid down by Lord Chief Baron *Gilbert* in his history of *C. B.* 195. though founded in reason, does not seem to be warranted intirely by the cases; the rule laid down by him is, that wherever the death of any party happens pending the writ, and yet the plea is in the same condition as if such party were living, there such death makes no alteration. However, now by 8 & 9 *W.* 3. *c.* 11: if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of action survive, the action shall not be thereby abated, but such death being suggested on the record, shall proceed, &c.

By the same act, if any plaintiff happen to die after an interlocutory judgment, the action shall not abate, if it might originally be maintained by the executors of such plaintiff, and if the defendant die after such interlocutory judgment, the action shall not abate, if it might originally be maintained against the executors of such defendant; and the plaintiff or his executors may have a *sci. fa.* against the defendant or his executors, to shew cause why damages should not be assessed, &c.

By the 17 *Car.* 2. *c.* 8. it is enacted, That in all actions personal, real or mixed, the death of either party between the verdict and judgment shall not be alledged for error, so as such judgment be entered within two terms after such verdict.

The death of either party before the assizes is not remedied by this statute, but if the party die after the assizes begin, though the trial be after his death that is within the remedy of the statute, for the assizes is but one day in law. Yet the Court said it was in their discretion, whether they would arrest the judgment; but in Lord *Raymond* 1415. it was holden not assignable for error, it appearing by the record that the defendant appeared *per attornatum suum*. Salk. 8.

CHAPTER IV.

Of Demurrer to Evidence.

IF the plaintiff or defendant give in evidence matter of record, or writings, or parol evidence on which a doubt in law arifes, the other fide may demur to the evidence; otherwife if there be a doubt whether the fact be well proved, for the jury may find it on their own knowledge. He that demurs to evidence admits it to be true, and if the matter of fact be uncertainly alledged, or it be doubtful whether it be true or not, becaufe offered to be proved only by prefumptions and probabilities, and the other party will demur thereupon, fo that the truth of the fact as well as the validity of evidence be referred to the court, he that alledges this matter cannot join in demurrer, but ought to pray judgment of the court that his adverfary may not be admitted to his demurrer, unlefs he will confefs the matter of fact to be true; and if he do not fo do, but join in demurrer, he has likewife mifbehaved, and the court cannot proceed to judgment, but a *venire de novo* fhall go. Where there is a demurrer to evidence, the judge orders the affociate to take a note of the teftimony, and that is figned by the counfel on both fides, and the demurrer is affixed to the *poftea*. If one demur properly, the other ought to join, except it be in an information at the fuit of the king; *a fortiori* the king himfelf need not, as in a *quare impedit*, but the judge muft direct the jury to find the matter fpecially. In *affumpfit* to prove a confideration, an arreft was to be proved by the plaintiff, and for that he did not produce the writ, the defendant demurred; and it was agreed by the court that the writ ought to have been produced, but by the demurrer it is confeffed; the arreft being matter of fact, though to be proved by matter of record; and the jury might of their own knowledge know there was a writ; and by the demurrer all matters of fact are confeffed that the jury could know of their own conufance.

Co. L. 27. 5 Co. 104. 1 Lev. 87.

Aleyn 18.

Terry v. Weftmore, at Maidftone 1682, per Pemberton, Ch. J. Co. L. 72.

1 Lev. 87.

On a demurrer to evidence, the only queftion for the confideration of the court is whether the evidence given be fuch as ought to be left to the jury in fupport of the iffue joined; and no objection can be made to the declaration or other pleadings in that ftage of the caufe. The judgment on fuch a demurrer is, that the evidence is, or is not fufficient to maintain the iffue joined,

Cockfedge v. Fanfhaw, Eaft. 19 Geo. 3. B. R. Cort v. Birbeck. Hil. 19 Geo. 3. B. R. Afh. Ent. 194.

On

On a demurrer to evidence the most usual course is to discharge the jury without more inquiry, (though they may find damages conditionally) and for a writ of inquiry to be executed after. But if the matter be clear, the court need not admit a demurrer. If the judge admit that for evidence, which is not, the party cannot demur for that cause, but must tender a bill of exceptions. Cr. Car. 143. L. Raym. 60. 2 Ro. 119. Salk. 284.

The following form of a demurrer to evidence and joinder thereto, may perhaps be found useful at an assizes.

"Afterwards on the day, and at the place within contained, before Sir *Richard Adams* knight, one of the barons of our lord the king, of his court of *exchequer* at *Westminster*, Sir *Richard Aston* knight, one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, and others their fellows, justices of our said lord the king, assigned to take the assizes in and for the city of *W*—— in the county of the same city, according to the form of the statute, &c. come as well the within-named *Charles Withers*, esq; as the within-named *George Wingfield*, esq; by their attornies within-named. And the jurors of the jury, whereof mention is within made; that is to say *R. L.* &c. being called likewise come, and being chosen, tried and sworn to say the truth of the premisses within contained; as to the first issue between the parties within joined, say that the said *George Wingfield* is guilty of the trespass within complained of, in manner and form as the said *Charles Withers* hath above complained; and they assess the damages of the said *Charles Withers*, by reason thereof to six pence. And as to the issue lastly within joined between the said parties, the said *George Wingfield* shews in evidence to the jury aforesaid, to prove and maintain the issue lastly within joined on his part by one witness, that" (so state the evidence) "And the said *Charles Withers* says, that the aforesaid matter to the jurors aforesaid, in form aforesaid shewn in evidence by the said *George Wingfield*, is not sufficient in law to maintain the said issue lastly within joined, on the part of the said *George Wingfield*, and that he the said *Charles Withers*, to the matter aforesaid, in form aforesaid shewn in evidence, hath no necessity, nor is he obliged by the laws of the land to answer; and this he is ready to verify: Wherefore for want of sufficient matter in that behalf shewn in evidence to the jury aforesaid, the said

"*Charles Withers* prays judgment, and that the jury aforesaid, "may be discharged from giving any verdict upon the said "issue; and that his damages by reason of the trespass within "complained of, may be adjudged to him, &c." "And the "said *George Wingfield*, for that he hath shewn in evidence "to the jury aforesaid, sufficient matter to maintain the issue "lastly within joined, on the part of the said *George Wingfield*, "and which he is ready verify; and for as much as the "said *Charles Withers* doth not deny, nor in any manner an- "swer the said matter, prays judgment; and that the said "*Charles Withers* may be barred from having his aforesaid "action against him, and that the jury aforesaid may be dis- "charged from giving their verdict upon the issue lastly join- "ed, &c. Wherefore let the jury aforesaid be discharged by "the Court here, by the assent of the parties, from giving "any verdict thereupon."

Joinder in demurrer.

CHAPTER V.

Of Bills of Exceptions.

BY *Westminster* 2. (13 *E.* 1.) it is enacted, That if one impleaded before any of the justices, alledge an exception, praying that the justices will allow it, and if they will not, if he write the exception and require the justices to put their seals to it, the justices shall so do, and if one will not, another shall. And if the king, on complaint made of the justices, cause the record to come before him, and the exception be not in the roll, on shewing it written with the seal of the justice, he shall be commanded at a day to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judge and allow, or disallow the exception.

Salk. 288.

The bill of exceptions must be tendered at the trial. The nature and reasoning of the thing requires the exception should be reduced into writing when taken and disallowed, like a spe-

cial

cial verdict or a demurrer to evidence, not that they need to be drawn up in form, but the ſubſtance muſt be reduced into writing while the thing is tranſacting. If a judge allow the matter to be evidence, but not concluſive, and ſo refer it to the jury, no bill of exception will lie; as if a man produce the probate of a will to prove the deviſe of a term for years, and the judge leave it to the jury, but he may have an attaint againſt the jury if they find againſt the will. Sir T. Raym. 405.

A bill of exception ought to be upon ſome point of law, either in admitting or denying of evidence, or a challenge, or ſome matter of law ariſing upon fact not denied, in which either party is over-ruled by the court: If ſuch bill be tendered and the exceptions in it are truly ſtated, then the judges ought to ſet their ſeal in teſtimony that ſuch exceptions were taken at the trial; but if the bill contain matters falſe, or untruly ſtated, or matters wherein they were not over-ruled, they are not obliged to affix the ſeal. A bill of exceptions is not to draw the whole matter into examination again, it is only for a ſingle point, and the truth of it can never be doubted after the bill is ſealed, for the adverſe party is concluded from averring the contrary, or ſupplying an omiſſion in it. Bridgman and Holt, Sh. Par. Ca. 120.

If the judges refuſe to ſign the bill, the party grieved by the denial may have a writ upon the ſtatute, commanding the ſame to be done *juxta formam ſtatuti*; it recites the form of an exception taken and over-ruled, and it follows *vobis præcipimus quod ſi ita eſt, tunc ſigilla veſtra apponatis*; and if it be returned *quod non ita eſt.* an action will lie for a falſe return, and thereupon the ſurmiſe will be tried, and if found to be ſo, damages will be given, and upon ſuch a recovery a peremptory writ commanding the ſame. 2 Inſt. 426. Bridgman and Holt.

In Sir *H. Vane*'s caſe, (who was indicted for high treaſon) the court refuſed to ſign a bill of exceptions, becauſe they ſaid criminal caſes were not within the ſtatute, but only actions between party and party. But in 1 *Leon.* 5. it was allowed in an indictment for a treſpaſs, and in 1 *Vent.* 366. in an information in nature of a *quo warranto.* 1 Lev. 68.

A bill of exceptions is only to be made uſe of upon a writ of error, and therefore where a writ of error will not lie, there can be no bill of exceptions. Caſ. temp Hardw. 249. Rex v. Inhabitants of Preſton, Hil. E. 9 G. 2.

Though *ex rigore juris* the party ſhall not have advantage of his bill of exceptions, but on a writ of error; yet where the action 19 H. 8. 24, 25. 2 Lev. 236.

action has been brought in the court of *K. B.* that court, to prevent delay and expence, has sometimes examined the matter before judgment.

If the bill of exceptions be not tacked to the record, it seems necessary to set out the whole record in it in the following manner.

"Be it remembered, that in the term of the Holy Trinity, "in the third year of the reign of our sovereign lord *George* the "3d. now king of *Great Britain*, and so forth, came *William* "*Hickell* by *James Philips* his attorney, into the court of "our said lord the king of the bench at *Westminster*, and "impleaded *John Money*, *James Watson*, and *Robert Black-* "*more*, in a certain plea of trespass, on which the said "*William* declared against them, that" (set out the declaration and other pleadings,) "And thereupon the issue was "joined between the said *William* and the said *John Money*, "*James Watson*, and *Robert Blackmore*; and afterwards, to "*wit*, at the sittings of *Nisi Prius* held at the *Guildhall* of "the city of *London* aforesaid, in and for the said city, "before the right honourable Sir *Charles Pratt*, knight, chief "justice of our said lord the king of the bench at *Westminster*, "*Thomas Lloyd*, esq; being associated to the said Chief Jus- "tice according to the form of the statute in such case "made and provided; on *Wednesday* the sixth day of *July*, in "the third year of the reign of our said lord the present king, "the aforesaid issue so joined between the said parties as afore- "said, came to be tried by a jury of the city of *London* "aforesaid, for that purpose duly impanelled, that is to say, "*A. B.* and *C. D.* &c. good and lawful men of the said city "of *London*; at which day came there as well the said *William* "*Hickell*, as also the said *John Money*, *James Watson*, and "*Robert Blackmore*, by their respective attornies aforesaid. "And the jurors of the jury aforesaid impanelled to try "the said issue being called also came, and were then and "there in due manner chosen and sworn to try the same issue; "and upon the trial of that issue the counsel learned in the law "for the said *William Hickell*, to maintain and prove the said "issue, on his part gave in evidence, that" (So set out the evidence on the part of the plaintiff, and then set out the evidence on the part of the defendants, and then proceed as

 follows

follows) "Whereupon the ſaid counſel for the ſaid defen-
"dants, did then and there inſiſt before the chief juſtice afore-
"ſaid, on the behalf of the defendants above-named, that the
"ſaid ſeveral matters ſo produced and given in evidence on
"the part of the ſaid defendants as aforeſaid, were ſufficient,
"and ought to be admitted and allowed as deciſive evidence,
"to entitle the ſaid defendants to the benefit of the ſtatute
"made in the 24th year of the reign of his late majeſty king
"*George* the Second, intitled, an act for rendering juſtices of
"the peace more ſafe in the executions of their office, and
"for indemnifying conſtables and others, acting in obedi-
"ence to their warrants; and that therefore the ſaid *William*
"*Hickell* ought to be barred of his aforeſaid action, and the
"ſaid defendants acquitted thereof, and thereupon the ſaid
"defendants, by their counſel aforeſaid, did then and there
"pray of the ſaid juſtice to admit and allow the ſaid matters and
"proof ſo produced and given in evidence for the ſaid defen-
"dants aforeſaid, to be concluſive evidence to intitle the ſaid de-
"fendants to the benefit of the ſtatute aforeſaid, and to bar the
"ſaid *William* of his action aforeſaid. But to this, the counſel
"learned in the law, on behalf of the ſaid *William Hickell*, did
"then and there inſiſt before the chief juſtice aforeſaid, that
"the matters and evidence aforeſaid ſo produced and proved on
"the part of the ſaid defendants as aforeſaid, were not ſufficient
"nor ought to be admitted or allowed to entitle the ſaid defen-
"dants to the benefit of the ſtatute aforeſaid; or to bar the ſaid
"*William Hickell* of his aforeſaid action, and that neither the ſaid
"defendants, or any of them, nor the ſaid earl of *Hallifax*, were
"or was within the words or meaning of the ſtatute made in
"the ſeventh year of the reign of his late majeſty king *James*
"the Firſt, intitled, an act for eaſe in pleading againſt trouble-
"ſome and contentious ſuits, proſecuted againſt juſtices of
"peace, mayors, conſtables, and certain other his majeſty's
"officers, for the lawful execution of their office, nor of the
"ſtatute made in the 21ſt year of the reign of the ſame late
"king, intitled, an act to enlarge and make perpetual the
"act made for eaſe in pleading againſt troubleſome and conten-
"tious ſuits proſecuted againſt juſtices of the peace, mayors,
"conſtables, and certain other his majeſty's officers, for the
"lawful execution of their office, made in the ſeventh year of
"his majeſty's moſt happy reign; nor of the ſaid ſtatute
"made in the 24th year of the reign of his late majeſty king

" *George* the Second; nor in any way entitled to the benefit " of any of these statutes: And the counsel for the said " *William Hickell* further insisted, that the seizure and im- " prisonment of the said *William Hickell* were not made or " done in obedience to the said warrant, nor have the said " defendants, or any of them in that behalf, any authority " thereby. And the said Chief Justice did then and there " declare and deliver his opinion to the jury aforesaid; That " the said several matters so produced and proved on the " part of the defendants were not upon the whole case suffici- " ent to bar the said *William Hickell* of his aforesaid action " against them, and with that direction left the same to the " said jury; and the jury aforesaid then and there gave their " verdict for the said *William Hickell*, and 300 *l.* damages; " whereupon the said counsel for the said defendants did then " and there, on the behalf of the said defendants, except " to the aforesaid opinion of the said Chief Justice, and " insisted on the said several matters and proofs as an abso- " lute bar to the aforesaid action, by virtue of the last men- " tioned statute: And in as much as the said several matters " so produced and given in evidence, on the part of the said " defendants, and by their counsel aforesaid objected and " insisted on as a bar to the action aforesaid, do not appear " by the record of the verdict aforesaid, the said counsel for " the aforesaid defendants did then and there propose their " aforesaid exception to the opinion of the said Chief Justice, " and requested the said Chief Justice to put his seal to this " bill of exception, containing the said several matters so " produced and given in evidence on the part of the said de- " fendants as aforesaid, according to the form of the statute " in such case made and provided; and thereupon the afore- " said Chief Justice, at the request of the said counsel for the " above named defendants, did put his seal to this bill of ex- " ception, pursuant to the aforesaid statute in such case made " and provided, on the sixth day of *July* aforesaid, in the third " year of the reign of his said present majesty."

The above precedent is taken from a bill of exceptions, which was made use of within these few years past: but it does not seem necessary to state the whole record in the bill, provided the bill be tacked to the record; which the statute plainly shews may be done, by saying, *if the exceptions be not in the roll*: And there are precedents to warrant this mode of proceeding.

The

The bill of exceptions would then begin as follows, "Which said issue in form aforesaid joined between the par- "ties aforesaid, afterwards, *to wit*, at the sittings, *&c.*" (*and then pursue the former precedent.*) Vide bill of exceptions in Todd v. East-India Company, Dom. Proc. 1787. and April 1788.

CHAPTER VI.

Of Defects amendable after Verdict or aided by it.

THE rule is to allow amendments wherever the judge has an authority to try the cause. As if the *Nisi Prius* roll differ from the plea roll in a matter which does not alter the issue, for it is only a transcript of it to carry the issue of it into the county. But in ejectment, if the *venire* be *de placito transgressionis*, omitting *et ejectionis firmæ*, it is ill, because not in the same action; but if the *distringas* or *hab. corp.* is right, the *venire* will be null, and the want of it is aided. So in *sci. fa.* against an executor to have execution of a judgment for damages in trover, it was moved in arrest of judgment, that the *venire* was in *placito debiti*, and a new *venire* was awarded. The verdict itself may be amended by the memory of the judge who tried the cause. And on the authority of that case in *Cro. Car.* the *postea* was amended by the judge's notes; where the associate had mistaken and entered 1 *d.* damage in covenant, taking it for debt instead of entering damages 274 *l.* So a special verdict may be amended by the minutes taken by the clerk of assize, but nothing can be added to the minutes tho' ever so strongly proved, for that would be to subject the jury to an attaint for what was not found by them. Wildare and Handy, Tr. 14 G. 2. Carth. 506. Cr. E. 259. Cr. Car. 338. Newcomb v. Green, M. 17 G. 2. Salk. 47.

If an issue be tendered by the plaintiff, and the defendant join the *similiter* by the plaintiff's name, or *vice versa*, this shall be amended, there being a negative and an affirmative between the parties. Cr. J. 67.

It is an established doctrine, that a verdict will aid a title defectively set out, but not a defective title. As in trespass for taking Rex v. Episc. Landaff, H. 8 G. 2. 2 Str. 1023.

taking dung without saying *fimum suum* or *ipsius querentis*, for that is a plain defect of title; but it will cure all the omissions of the parties in the allegations, which must be presumed to have been given in evidence to the jury: as in a *quare impedit*, if a presentation be not alledged, yet if the issue were such as to make it necessary for the plaintiff to prove one, the want of the allegation will be cured by the verdict.

Cr. J. 94. So surplusage doth not vitiate after a verdict, but if it be repugnant to what is before alledged, it is void. As in trover, if the plaintiff declare that on the 4th of *March* he was possessed of goods, and that after, *viz.* 1st of *March* they came to the defendant's hands.

Cr. J. 377. If the gist of the defendant's bar be bad, it will not be cured by a verdict found for him, but the plaintiff shall have judgment if the verdict pass for him, either for the badness or the falseness of the bar; as if in debt on a single bill the defendant plead payment without any acquittal, and it is found for him, yet he shall not have judgment because the gist of the plea is bad, since the obligation is in force till dissolved, *eo ligamine quo ligatum est*; but if it had been found for the plaintiff, he should have had judgment.

Note; in fact such plea would at this day be good by 4 *Anne*, *c.* 16. *s.* 12. but the case equally serves for illustration.

Carth. 371. Noy 56. A verdict cannot help an immaterial issue, but will an improper or an informal one; as if not guilty be pleaded in debt, tho' this be an improper issue, yet if found for the plaintiff, he shall have judgment. 1 Vent. 70. So in assault and battery the defendant justified *quod moderate castigavit*, the plaintiff replied *quod non moderate castigavit*, and after a verdict for him had judgment, though the traverse was informal, for it ought to have been *de injuria sua propria*. Yelv. 34. So in replevin, where the defendant avowed for rent, for that *A.* being seised in fee married *B.* and had issue *D.* and that *B.* and *D.* after the death of *A.* granted the rent, the plaintiff traversed the seisin of *A.* the defendant had a verdict, and it was holden good, though the issue was not so apt as it might have been, for the seisin of the grantor was what ought properly to have have been traversed.

But for the better understanding what defects are amendable after verdict, or are aided by it, it will be necessary to take a cursory

cursory view of the several statutes of amendments and jeofails, and to note some of the determinations thereupon.

By 14 *E.* 3. *c.* 6. No process shall be annulled or discontinued by the misprision of the clerk in writing one syllable or letter too much or too little, but it shall be amended.

The judges construed this statute so favourably as to extend it to a word; but not being agreed whether they could make these amendments as well after judgment as before occasioned the making the 9 *H.* 5. *c.* 4. and 4 *H.* 6. *c.* 3. by which such power is given to them as long as the record or process is before them. 8 Co. 157. b.

By 8 *H.* 6. *c.* 12. No judgment or record shall be reversed or annulled for error in any record, process or warrant of attorney, original writ or judicial panel, or return, by razure, interlining, or by addition, substraction or diminution of words, letters, titles, &c. but the judges in affirmance of judgment may amend all that which to them seems to be the misprision of the clerk.

By 8 *H.* 6. *c.* 15. The judges in any records or process before them by error or otherwise, or in returns of sheriffs, coroners, &c. may amend the misprision of the clerk of the court, or of the sheriffs, coroners, their clerks, or other officer whatsoever, in writing a syllable or letter too much or too little.

32 *H.* 8. *c.* 30. enacts, that if (1) any issue be tried (2) by oath of 12 men, for the (3) party, plaintiff or demandant, or for the party tenant, or defendant, in any courts of record, judgment shall be given, any (4) mispleading, lack of colour, insufficient pleading, or jeofail, any miscontinuance or (5) discontinuance or (6) misconceiving of process, misjoining of the issue, lack of warrant of attorney of the party against whom the issue shall be tried, or other negligence of the parties, their counsellors or attornies notwithstanding, and the judgment shall stand according to the (7) verdict without reversal.

1. If in replevin the plaintiff is nonsuited after evidence, and the jury assess damages for the avowant, this is no trial within the act, for it is only in nature of an inquest of office. Cr. J. 359. Vide 4 & 5 An. cap. 16.

2. An issue upon *nul tiel record* is not within the act. 11 Co. 8.

3. So an issue between the demandant and vouchee is not within the act. 11 Co. 6.

4. If

Ibid. 4. If as to part the defendant join iſſue, but ſay nothing to the reſt, and this iſſue be found for the plaintiff, he ſhall have judgment; but if pleaded to the whole, it is a bad plea, and not helped by the ſtatute.

Hardr. 331.

1 R. R. 161. Cr. J. 528. 5. This ſtatute extends to diſcontinuances on the part of the plaintiff as well as thoſe on the part of the defendant; and to thoſe after as well as before verdict.

Savil. 37. Yelv. 15. 6. Miſconceiving of proceſs within this act is, as if a *diſtringas* be awarded where it ſhould be a *ha. cor.* But it is otherwiſe if a *venire* (or other proceſs) be awarded to a wrong officer.

Yelv. 169. 7. If the judgment be not given upon the verdict, it is not within the act; as in debt againſt an heir who pleads *riens per diſcent*, except 20 acres in *D.* upon which iſſue is joined, and verdict for the defendant. If the plaintiff take judgment upon the confeſſion, it may be reverſed by reaſon of a diſcontinuance.

18 *Eliz. c.* 14. enacts, that after verdict judgment thereupon ſhall not be reverſed for want of form touching falſe *Latin*, or variance from the regiſter or other faults in form or for want of any (1) writ, original or judicial, or by reaſon of any (2) imperfect or inſufficient return of any ſheriff or other officer, or for want of any warrant of attorney, or for any fault in proceſs upon or after any aid, prayer and voucher.

Cr. E. 722. 1. An ill writ in ſubſtance, or a good writ which warrants not the declaration, is not aided by the ſtatute: But the want of a bill on the file, which is in nature of an original, is aided by the equity of the act.

Yelv. 110. 2. But if there be no return, or the writ be *album breve*, this is not helped by this act, however, it ſeems remedied by the following ſtatute.

21 *Jac.* 1. *c.* 13. enacts, That after verdict, judgment thereupon ſhall not be ſtayed or reverſed for any variance in form only between the original or bill, and the declaration, plaint or demand, or for lack of the averment of any life, ſo it be proved they are living; or becauſe the *venire ha. cor.* or *diſtringas* was awarded to a wrong officer upon any inſufficient ſuggeſtion, or for miſnaming any of the jury in ſurname or addition in any of the writs or returns thereof, ſo as they be proved to be the ſame as were meant to be returned; or for that there is no return upon any of the writs, ſo as a panel

be

be returned and annexed thereto; or for that the sheriff or other officers' names be not set to the return of such writ, so as it appears by proof that the writ was returned by him; or for that the plaintiff in ejectment or other personal action being under age appeared by attorney: if a verdict pass for him.

There were but 24 returned upon the panel annexed to the *venire facias*, but there were 48 upon the *ha. cor.* upon which the defendant made no defence; and upon motion the verdict was set aside without costs, the court saying that the 21 *Jac.* 1. means only the formal words upon the writ, for there must be a panel annexed to the return. Brown and Johnston, C. B. Tr. 11 G. 2.

16 & 17 *Car.* 2. *c.* 8. (which was called by justice *Twisden*, the omnipotent act) enacts, That after verdict, judgment thereupon shall not be stayed or reversed for want of form, or pledges returned upon the original, or for want of pledges upon any bill or declaration, or for want of a profert of any deed, or of letters testamentary or of administration, or for the omission of *vi et armis* or *contra pacem*, or for or by reason of the mistaking of the Christian or surname of either party, sums, day, month, or year, in any bill, declaration and pleading, being right in any writ, plaint, roll or record preceding, or in the same, to which the plaintiff might have demurred, and shewed the same for cause, or for want of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or for that there is no right *venue*, so as a trial was by a jury of the proper county where the action is laid, or for want of a *misericordia* or *capiatur*, or because one is entered for the other; and that all such omissions, variances, and defects, and other matters of like nature, not being against the right of the matter of the suit, or whereby the issue of the trial are altered, shall be amended, where such judgments are or shall be removed by writ of error. 1 Vent. 100.

In an action for words the plaintiff declared, that the defendant said *apud London*, that he had stolen plate at *Oxford*; the defendant justified that he did steal plate at *Oxford*, *per quod* he spoke the words at *London*; the plaintiff replied *de injuria sua propria*; and upon issue tried in *London*, obtained a verdict; and though it was allowed, that the only point in issue was, whether the felony were committed, which was triable at *Oxford*, yet it was holden to be aided by this act, and the plaintiff had judgment. 1 Saund. 247.

Note;

Str. 1022. Note; An actual amendment is never made upon this act, but the benefit of the act is attained by the court's over-looking the exception.

4 & 5 *Anne c.* 16. enacts, That no judgment, by confession, *&c.* or upon any writ of enquiry of damages executed thereon, shall be stayed or reversed for any imperfection, matter or thing whatsoever, which would have been cured by any of the statutes of jeofail, in case of a verdict, so as there be an original writ or bill, and warrant of attorney duly filed according to the law, as is now used.

Rex v. Ellames, Pasch. 1734. Note; The foregoing statutes are construed not to extend to criminal proceedings, on account of the words "plaintiff "and defendant" made use of in them. But by 9 *An. c.* 20. it is enacted, That all the statutes of jeofail shall be extended to all writs of *mandamus* and informations in nature of a *quo warranto.*

5 *G.* 1. *c.* 13. After the clause of amendment of writs of error, says that where any verdict hath been, or shall be given in any action, suit, bill, plaint or demand, *&c.* The judgment thereupon shall not be stayed or reversed for any defect or fault either in form or substance, in any bill, writ, original or judicial, or for any variance in such writs from the declaration or other proceedings.

CHAPTER VII.

Of new Trials.

WE have seen in the first chapter of this book how the jury are to demean themselves during the time of the trial, and in their consultations after they are withdrawn from the bar. However, as it often happens, that the verdict which they give is not satisfactory, it is worth enquiring for what causes a verdict maybe set aside, and a new trial granted.

2 Salk. 647. It is a general rule, that you shall not move for a new trial, after you have moved in arrest of judgment. However, this rule

rule extends only to such cases where the party has knowledge of the fact at the time of moving in arrest of judgment, therefore a new trial was granted after such a motion on affidavits of two of the jury, that they drew lots for their verdict. Phillips and Fowler, C. B. 9 G. 2.

An information was exhibited against three, and a verdict against all three; and a new trial granted as to *Fern*, because he had not sufficient notice given him, and this special cause entered upon the record, and judgment was against the other two. Yet the authority of this case may well be doubted, for where there were several defendants, and the verdict as to some was against evidence, yet the court would not grant a new trial, for they said the verdict must stand or fall *in toto*. Fern's case, Hil. 27 & 28 Car. 2. tamen quære. Collier and Morris, Mic. 1735. Capt. Crabb's case, M. 23 G. S. P.

So where one issue out of four was against evidence, the court granted a new trial, not only as to that issue, (for that they said cannot be) but for the whole. Rex v. Pool, E. 1734.

But then, the issue found against evidence must be a material one; for if out of three issues two were found against evidence, yet if the material issue in the cause be agreeable to evidence, the court will not grant a new trial. Dexter v. Barrowby, E. 25 G. 2.

As the granting of a new trial is absolutely in the breast of the court, they will often govern their discretion by collateral matters; and therefore will not grant a new trial in hard actions, such as case for negligently keeping his fire; nor where the equity of the cause is on the other side. Salk. 644.

In an action for a libel, the jury found a verdict for the defendant, which the judge reported to be against evidence, but said he should have been satisfied with half-a-crown damages; whereupon the court of *K. B.* refused to grant a new trial, saying it was no matter of contract, no special damages laid or proved, but only a vindictive action, and courts of justice are not to assist the passions of mankind. Burton and Thompson, Mic. 32 G. 2.

In an issue out of chancery, upon a motion for a new trial, because the defendant had produced evidence by surprize, which the plaintiff if prepared could have answered; one main reason for denying the motion was, that the plaintiff suffered a verdict to be given, when he might have been nonsuited, which I mention as a caution in cases of the like kind. Richards v. Syms, 1742.

New trials are often granted for the misbehaviour of the jury, as if they cast lots for their verdict; or if any of them declare, that the plaintiff or defendant shall not have a verdict,

let

let him produce what evidence he will. So if they eat at his expence for whom they give the verdict, &c.

Walker and Scott, H. 23 G. 2.

The court will not grant a new trial, becaufe the defendant came unprepared, even though it be in a matter which it was impoffible for him to forefee, *ex. gr.* Where a witnefs was produced to prove a fact committed at *Canterbury*, who could be proved at the time to be at another place.

Markham v. Middleton, Tr. 29 G. 2.

In actions founded upon torts, the jury are the fole judges of the damages, and therefore in fuch cafes the court will not grant a new trial on account of the damages being trifling or exceffive. But in actions founded upon contract, and where debt would lie, (and before *Slade's* cafe would have been brought) the court will enquire into the circumftances of the cafe, and relieve if they fee reafon.

Upon a motion for a new trial, the way is to grant a rule to fhew caufe, and then the puifne judge of the court fpeaks to the judge who tried the caufe, (if it be not one of the fame court) and obtains a report from him of the trial, and alfo a fignification of what his fentiments are upon it. If the judge declare himfelf fatisfied with the verdict, it hath been ufual not to grant a new trial on account of its being a verdict againft evidence. On the other hand, if he declare himfelf diffatisfied with the verdict, it is pretty much of courfe to grant it. But in a cafe where the judge only reported evidence, without declaring himfelf to be fatisfied or diffatisfied with the verdict, the court of *K. B.* were under a difficulty how to behave; however they feemed inclined to hear it fpoken to; but through their interpofition the parties agreed to abide by the determination of the point of law.

Rex v. Phillips, 23 G. 2.

A new trial may alfo be moved for on account of the mifdirection of the judge in a matter of law, or for his admitting or refufing evidence contrary to law.

Salk. 646.

So the want of due notice is a proper ground for a motion for a new trial; but the defendant is precluded, if he appear at the affizes and make defence.

Bates v. Pettiter, Mic. 1733.

Note; That in giving notice of trial according to the diftance of place, the miles muft be by reputation and not admeafurement.

Though the ufual method is to grant a new trial upon payment of cofts, where it is a verdict againft evidence; yet under particular

particular circumstances it may be granted without costs, as where an action was brought on two bills of exchange payable to *A. B. or order*, one of them being indorsed to the plaintiff, the other to *J. S.* without adding *or order*, and by him indorsed to the plaintiff, wherefore the jury found for the plaintiff, on the first bill, and for the defendant on the second; apprehending that by the usage of merchants, it was not assignable by *J. S.* without the words *or order*. On motion a new trial was granted without costs, because the plaintiff (if the verdict were to stand) would be entitled to costs. Eddie and Laird v. E. I. Comp. Tr. 1 G. 3. Burr.

A material witness for the defendant concealed himself in the plaintiff's house, to avoid being served with a subpœna, by which mean the plaintiff obtained a verdict, but the court set it aside without costs, it being unreasonable for the plaintiff to carry the cause down to trial, when she knew the defendant could not make a defence. Montpesson v. Randle, H. 20 G. 2.

CHAPTER VIII.

Of Costs.

THE statute of *Gloucester*, 6 *Ed.* 1. *c.* 1. is the first statute in relation to costs; by which in an assize, &c. damages upon the insufficiency of the disseisor are given against him that is found tenant, and damages are given in a writ of *mort d'ancestor, aiel*, &c. reciting, that whereas before that time, damages were not taxed but to the value of the issues of the land, it is provided the demandant may recover the costs of his writ against the tenant, together with his damages, and that this act shall hold place in all cases where the party is to recover damages.

Where a man before, or by this act did not recover damages, though simple, double, or treble, are given by a subsequent act, the plaintiff shall recover no costs; as in *quare impedit*; *decies tantum*: So in an action upon 5 *E.* 6. *c.* 14. of ingrossers: But in all cases where damages were recovered before, or by this act, the plaintiff shall recover his costs also. 2 Inst. 288.

This

This was the original of cofts *de incremento*; but as there are feveral ftatutes fince made, I fhall confider them in order.

Firft, where the plaintiff fhall have no more cofts than damages.

By 43 *El. c.* 6. If upon actions perfonal, not being for any title or intereft of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it fhall be certified by the judge before whom it fhall be tried, that the debt or damages to be recovered therein do not amount to 40 *s.* the plaintiff fhall have no more cofts than damages.

By 21 *Jac.* 1. *c.* 16. If the damages be under 40 *s.* in actions on flander, the plaintiff fhall have no more cofts than damages.

By 22 & 23 *Car.* 2. *c.* 9. In all actions of trefpafs, affault, and battery, and other perfonal actions, wherein the judge at the trial fhall not certify that an affault and battery was fufficiently proved, or that the freehold or title of the land was chiefly in queftion, if the jury find damages under 40 *s.* the plaintiff fhall recover no more cofts than damages.

Hamfon v. Adfhead, Tr. 27 G. 2. K. B.

Declaration was, that the defendant made an affault on the plaintiff, and then and there pufhed him down on the ground, the faid ground being covered with water, and thereby wetting and fpoiling his coat, whereby he became fick and weak, *&c.* after verdict for the plaintiff for 20 *s.* there being no certificate, the court on motion held the plaintiff not entitled to full cofts, for the wetting of the cloaths is not a diftinct thing from the affault, but is laid as a confequence of it; it is an injury arifing from the original caufe of action.

Sheldon v. Ludgate, C. B. Tr. 3 G. 1.

Note; on writs of inquiry in cafes within this ftatute, the plaintiff fhall have full cofts, though he do not recover fo much as 40 *s.* damages.

Salk. 208.

From the wording this ftatute of 22 & 23 *Car.* 2. it has been holden to extend to no other perfonal action than fuch as relate to the freehold, or things fixed to the freehold, *i. e.* only to fuch cafes where the freehold may by prefumption come in queftion.

Moor v. Hall. Tr. 1 G. 1.

Therefore in trover or trefpafs *de bonis afportatis*, of goods not fixed to the freehold, the plaintiff fhall have his full cofts. So in trefpafs *quare claufum fregit*, and impounding his cattle, becaufe the impounding is a perfonal injury, but then the defendant muft be found guilty of the impounding.

Hill v. Reeves, C. B. Eaft. 3 G. 1.

But where an action of trefpafs was brought for breaking and entering the plaintiff's clofe, and cutting down, lopping, and fpoiling trees there growing; and the plaintiff recovered a verdict,

verdict, and two-pence damages; it was holden he was intitled to no more costs than damages.

So in trespass for breaking and entering a house, breaking down the window shutters, and breaking to pieces and spoiling the bolt belonging to the window shutters; the plaintiff obtained a verdict, and one shilling damages, and held he was intitled to no more costs. Birch v. Daffey, C. B. Tr. 3 G. 2.

So in trespass for breaking and entering a dwelling house and making a great noise there, and continuing there until the plaintiff and another person were compelled to give and did give their note for 6 *l.* the plaintiff is intitled to no more costs than damages. Appleton against Smith, K. B. Hil. 2 G. 3.

Where the cause originally began in an inferior court, and was removed into *K. B.* or *C. B.* the plaintiff shall have his full costs, though the damages under 40 *s.* and no certificate. 4 Mod. 378.

There needs no certificate where it appears by the pleading that the interest of the land is in question, as where a view is granted. *Cockerill* v. *Allanson*, *K. B.* Tr. 22 *G.* 3. adjudged that where defendant justified for a right of way, and the plaintiff replied *extra viam*, and the defendant pleaded not guilty, the plaintiff should have no more costs than damages unless the judge certified; for the title does not necessarily come in question. It may or it may not; and if it does, the judge ought to certify.—So in assault and battery, if the defendant justify, for that admits the battery. But if the defendant justify, and thereupon the plaintiff make a new assignment, to which the defendant pleads the general issue, the plaintiff will have no more costs than damages without a certificate. 1 Raym. 76. Richards and Turner, Tr. 6 G. 1. C. B.

Note; Judges have differed as to their notions of giving these certificates; many having thought themselves bound by the verdict; others thinking the statute meant to leave it to their discretion on the whole circumstances of the case: And this seems to be now the prevailing opinion, as otherwise the statute would be intirely useless.

By 8 *&* 9 *W.* *c.* 11. in trespass, if it shall be certified by the judge, that it was wilful and malicious, the plaintiff shall have his full costs, although the verdict shall be for less than 40 *s.*

Secondly, Of awarding defendants their costs.

By 23 *H.* 8. *c.* 15. In trespass upon 5 *R.* 2. debt or covenant upon any specialty on contract, detinue, account charging as bailiff or receiver, case, or upon any statute for any offence or wrong immediately done to the plaintiff, if the plaintiff be nonsuited after appearance of the defendant, or any verdict against him, the defendant shall have his costs.

This statute does not extend to an action for an escape, nor to an action upon 8 *H.* 6. for a forcible entry, nor to an action 2 Leon 9. 3 Leon. 92.

1 Brownl. 66. 28.

upon 1 & 2 *Ph. & M.* for an unlawful impounding of a diſtreſs, nor to an action for perjury upon the ſtatute of 5 *El.* nor to an aſſize, nor to an action given by a ſubſequent ſtatute.

By 4 *Jac.* 1. *c.* 3. If any perſon commence any action of treſpaſs, or other action wherein the plaintiff might have coſts, and after appearance the defendant become nonſuited, or any verdict paſs againſt him, the defendant ſhall have his coſts.

Greetham v. Hund. of Theal. C. B. Tr. 5 G. 3.

In an action on 9 *G.* 1. by the party grieved (whoſe barns were burnt) againſt the hundred; the court held that the defendants were intitled to coſts on this ſtatute: they having obtained a verdict.

By the 8 & 9 *W.* 3. *c.* 11. in treſpaſs, aſſault, falſe impriſonment, or ejectment againſt ſeveral, if any one or more be acquitted by verdict, every perſon ſo acquitted ſhall recover his coſts, unleſs the judge ſhall immediately after trial in open court certify upon record, that there was a reaſonable ground for making ſuch perſon a defendant.

Dibbon and Cook, H. 8 G. 2. Ingles and Wadworth & al', Hil. 2 G. 3.

This ſtatute extends only to treſpaſs *vi et armis*, and not to treſpaſs on the caſe, nor to replevin.

Thirdly, coſts in waſte, tithe, *ſci. fa.* prohibition.

By the 8 & 9 *W.* 3. in all actions of waſte, debt for not ſetting out tithe, where the ſingle value found by the jury does not exceed twenty nobles; and in a *ſci. fa.* and ſuits upon prohibition, the plaintiff ſhall recover his coſts; and if the plaintiff be nonſuited or diſcontinue, or a verdict paſs againſt him, the defendant ſhall recover his coſts.

Wills and Turner, Hil. 2 G. 1. C. B. Sir E. Bettiſon v. Dr. Hinchman, M. 7 G. 1. C. B.

Note; Coſts in prohibition ſhall be taxed from the ſuggeſtion, ſo as to take in the coſts of the motion.—The ſtatute extends only to caſes after plea pleaded or demurrer joined, but if there be judgment by default, and the plaintiff have damages on a writ of enquiry for the contempt in proceeding after the prohibition delivered, which is confeſſed by the default, he will be entitled to coſts at common law. However as this part of the declaration is no more than form, coſts are allowed only from the time of the rule for a prohibition.

Fourth, Who are intitled to, or exempt from coſts.

1. Executors or adminiſtrators.

Harris v. Hennah, Tr. 8 & 9 G. 2. K. B.

An executor or adminiſtrator pays coſts in all caſes where he is defendant. So when he is defendant, and judgment is given for

for him, he ſhall have his coſts: But when he is plaintiff, he ſhall pay no coſts; however this muſt be underſtood to be when he is under a neceſſity of naming himſelf executor or adminiſtrator, for if he were under no ſuch neceſſity, he ſhall pay coſts. Marſh and Kelloway, Hil. 12 G. 2. B. R.

An executor pays coſts for not going on to trial; but not on judgment as in caſe of nonſuit. Str. 871.

And where the plaintiff declared ſingly as executor, and on the defendant's pleading other executors named with him, moved the court for leave to diſcontinue without paying coſts, the court refuſed it; for he ought to have known his own title. Harris v. Jones, Mich. 4 G. 3. B. R.

2. Officers.

By 7 *Jac. c.* 5. If caſe, treſpaſs, battery, or falſe impriſonment ſhall be brought againſt any juſtice of peace, mayor, bailiff, conſtable, *&c.* concerning any thing by them done by virtue of their office, they may plead the general iſſue, *&c.* and if the verdict ſhall paſs with the defendant, or the plaintiff ſhall be nonſuited, or ſuffer any diſcontinuance thereof, the defendant ſhall have his double coſts allowed by the judge before whom the matter is tried.

This act has been conſtrued to extend to under ſheriffs and deputy conſtables, though they are not particularly mentioned. Sir Th. Raym. 34.

Note; The 21 *Jac.* 1. *c.* 12. extends this act to churchwardens and overſeers of the poor.

The officer muſt get a certificate from the judge, that the action was brought againſt him for ſomething done in the execution of his office, in order to intitle himſelf to double coſts. 2 Vent. 45.

In treſpaſs for taking a gun, the plaintiff diſcontinued with leave of the court, and upon motion for a direction to the maſter to tax double coſts, upon producing an affidavit that the action was brought againſt him for what he did in the execution of his office as juſtice of peace, a rule was granted accordingly, the court ſaying that where there was a verdict for the defendant, and no certificate from the judge, (or after a nonſuit) a ſuggeſtion on the roll was proper, but that it was not neceſſary in the preſent caſe; for where there is a diſcontinuance with leave of the court, it is always upon payment of coſts; and therefore here it muſt be upon payment of double coſts. Deveniſh v. Martin, E. 1734.

3. Informers. 4. Party grieved.

Carth. 230. Salk. 206.

A common informer can in no caſe recover coſts, except expreſsly given by the ſtatute; but in an action on a ſtatute by the party grieved for a certain penalty, the plaintiff ſhall recover coſts within the ſtatute of *Glouceſter*, which gives coſts in all caſes where the party is to recover damages.——

Cr. Car. 560.

But where the duty is incertain, as to recover treble damages upon the ſtatute of waſte, or on 2 *Ed.* 6. for not ſetting out of tithe, there the plaintiff ſhall not have any coſts.

Tr. 15 G. 2. C. B.

Note; Where the penalty is given to a common informer, though the party grieved happen to bring the action, he muſt bring it as a common informer, and ſhall not have coſts.

By 5 *W.* & *M.* *c.* 11. All parties indicted, proſecuting a *certiorari* to remove an indictment or preſentment of treſpaſs or miſdemeanor before trial had from the general or quarter ſeſſions, ſhall before the allowance thereof find two ſufficient manucaptors, who ſhall enter into recognizance before one or two juſtices of the county or place in the ſum of 20 *l.* with condition to appear and plead, and to procure the iſſue to be tried at the next aſſizes, and ſuch recognizance ſhall be certified into the court of *K. B.* and the name of the proſecutor (if he be the party grieved or injured, or ſome public officer) to be indorſed on the back of the indictment returned; and if the defendant be convicted, the court of *K. B.* ſhall give reaſonable coſts to the proſecutor, if he be the party grieved or injured, or be a juſtice of the peace, mayor, bailiff, &c. who ſhall proſecute on account of any fact that concerned him as an officer to proſecute or preſent.

Rex v. M. Incleton, Mic. 20 G. 2.

A party injured within the meaning of this act muſt be ſuch a one as has received ſome real injury, and therefore where the defendant was proſecuted for an attempt to burn the houſe of *J. S.* and for that purpoſe ſolliciting *M.* to aſſiſt her, it was holden that the proſecutors (who were *M.* and *G.* next door neighbours to *J. S.*) were not intitled to coſts, and it was ſaid neither would *J. S.* if he had proſecuted.

5. Defendants in informations.

By 18 *El.* *c.* 5. (which is made perpetual by 27 *El.* *c.* 10.) if any informer or plaintiff upon a penal ſtatute ſhall willingly delay his ſuit, or diſcontinue or be nonſuited, or have a verdict againſt him, or judgment at law, he ſhall pay the defendant his coſts.

2 Str. 1203.

This

This ſtatute extends only to common informers, who are to have the benefit of the penalty, and not where the penalty or part of it is given to the party grieved. Salk. 30.

N. B. Proſecutors *q. tam.* are looked upon as common informers. 2 Leon. 116. Salk. 30.

There is a proviſo that it ſhall not extend to any officers who are uſed to exhibit informations, but it muſt appear upon record, elſe the court will take him to be a common informer, and will not admit affidavits to the contrary. 2 Raym. 1333.

By 4 & 5 *W.* & *M. c.* 18. The informer is to enter into a recognizance of 20*l.* to proſecute the information, and abide by ſuch orders as the court ſhall direct; and if the proſecutor do not, within one year after iſſue joined, procure the ſame to be tried, or if upon ſuch trial a verdict paſs for the defendant, or in caſe of a *nolle proſequi*, the court of *K. B.* is authorized to award the defendant his coſts, unleſs the judge before whom ſuch information ſhall be tried, ſhall at the trial in open court certify upon record, that there was a reaſonable cauſe for exhibiting ſuch information.

If there be ſeveral defendants, ſome of which are acquitted and others found guilty, none of them ſhall have coſts, for till 8 & 9 *W.* 3. *c.* 11. the plaintiff never paid coſts in any action if but one defendant were found guilty, and the 4 & 5 *W.* & *M.* cannot be intended to make proſecutors otherwiſe liable than as plaintiffs were in other actions. Salk. 194.

Fifthly, Coſts in traverſes.

The ſtatute of *Glouceſter* extends only to give coſts in actions real, perſonal, annd mixed, therefore traverſes of inquiſitions are not within it; And note; a *nočtanter* is not an action but a traverſe. Str. 1069.

Sixthly, Coſts where doubled.

Where damages were before recoverable, and are by any ſtatute increaſed to double or treble the value; coſts alſo as parcel of the damages ſhall likewiſe be doubled or trebled. Carth. 297.

But where a ſtatute gives damages double or treble, where no damages were formerly recoverable, no coſts ſhall be allowed. Ibid.

Seventhly, How to be aſſeſſed where pleadings double.

By 4 & 5 *Ann. c.* 16. Any defendant or plaintiff in replevin may, with leave of the court, plead as many ſeveral matters as he ſhall think neceſſary for his defence, provided that if any ſuch matter ſhall upon demurrer joined be judged inſufficient,

costs ſhall be given at the diſcretion of the court; or if a verdict ſhall be found upon any iſſue in the ſaid cauſe for the plaintiff or defendant, coſts ſhall alſo be given in like manner, unleſs the judge who tried the ſaid iſſue ſhall certify, that the ſaid defendant or plaintiff in replevin had a probable cauſe to plead ſuch matter.

Mic. 4 G. 3. C. B.

In treſpaſs the defendant pleaded three different juſtifications to three different counts, and on iſſue joined had a verdict for him on two, and againſt him on the third. On motion this was holden not to be a caſe within this act, and the plaintiff intitled at common law to coſts on the whole declaration.

Bartlet and Spooner, E. 1751. C. B.

In treſpaſs the defendant pleaded not guilty and ſeveral juſtifications; upon the trial the plaintiff not proving his poſſeſſion in the *locus in quo*, the defendant had a verdict, and by direction of *Deniſon* J. the verdict was entered upon the general iſſue only; upon which there was a motion for a *venire de novo*. But the court refuſed the motion, ſaying the verdict was compleat, and determined the cauſe, that the plaintiff was not intitled to damages, though they ſaid the plaintiff might have inſiſted to have a verdict entered on the other iſſues, for the ſake of coſts which he would be entitled to, unleſs the judge certified, that the defendant had probable cauſe to plead ſuch plea.

Dayrel v. Briggs, Tr. 25 G. 2. K. B. S. P.

Eighthly, Where a ſpecial jury.

By 24 G. 2. The party who moves for the ſpecial jury ſhall pay the whole expence occaſioned thereby, and in the taxation of coſts be allowed no more than if it had been a common jury; unleſs the judge, immediately after trial in open court, certify that it was a cauſe proper to be tried by a ſpecial jury: And the ſpecial jury ſhall have only what the judge allows, not exceeding one guinea.

As there are ſome caſes relating to coſts which could not be taken notice of under the foregoing heads, it will not be improper to inſert them together in this place.

Darlow v. Collinſon, Tr. 24 G. 2.

One defendant gave a general releaſe to the plaintiff after the coſts of nonſuit taxed, and upon motion he was ordered to pay the other defendants their ſhares.

Ex dem. Wilſon v. Foore & al'. E. 32 G. 2. C. B.

Each defendant is anſwerable for the whole coſts: therefore in an ejectment againſt ſeveral, where the defendants defended ſeverally; at the aſſizes one confeſſed and had a verdict

dict against him; and others did not confess; the court upon application said the officer must tax the same costs against all the defendants. If after the plaintiff has had satisfaction against one, he should take it against another, such defendant may apply to the court.

Costs upon feigned issues were formerly held to follow the event of the verdict in like manner as if it were an adversary suit. But vide *Hoskins* v. Ld. *Berkley*, 4 *T. Rep.* 402. Herbert v. Williamson, E. 25 G. 2. Powel v. Smith & ē con. Tr. 25 G. 2. Str. 1203. S. P.

In cross actions of assault each party being nonsuited, *S.* had his costs taxed at 9 *l.* 10 *s.* and *P.* his at 13 *l.* 10 *s.* whereupon he moved to be at liberty to deduct the 9 *l.* 10 *s.* out of the 13 *l.* 10 *s.* paid by him into the sheriff's hands; rule to shew cause, but the defendant not consenting, the court said they could not do it.

So in an action of trespass against four, three were acquitted and motion on their behalf that their costs might be deducted out of what the fourth defendant was to pay upon an affidavit that the plaintiff was a travelling Jew, *&c.* denied. But where *Roberts* had brought an action against *Biggs* and others, and *Biggs* had brought a cross action against *Roberts*, the court of *C. B.* ordered that upon *Biggs* acknowledging satisfaction for on the record in the cause in which he was plaintiff, the plaintiff in the other cause in which he (*Biggs*) and others were defendants, should be restrained from taking out execution. Mordica v. Nutting & al'. 1749. E. 27 G. 2.

So where a plaintiff being nonsuited the defendant took out a *fi. fa.* and levied part of the costs, and at the same time took out a *ca. sa.* for the rest, and took the plaintiff in execution, which being irregular, the court set it aside with costs; the defendant moved that the proceedings against him on account of these costs should be stayed, upon his entring up satisfaction upon the judgment obtained by him for the sum at which the costs for the irregularity were taxed, and upon shewing cause the rule was made absolute. Will' and Crabb, E. 24 G. 2.

Motion for judgment as in case of a nonsuit, and that the master should tax the costs for not going on to trial at the same time, refused, for the costs in the two cases ought not to be blended, being founded upon different rights: but if on shewing cause against the judgment of nonsuit, the court give the plaintiff further time, it is always on paying the costs for not going on to trial, unless there were a countermand in time. The Earl of Leicester v. Wooden, M. 1748. K. B.

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